Hendrickson Trucking Company *and* Local 164, International Brotherhood of Teamsters (IBT). Cases 07–CA–086624 and 07–CA–095591

October 11, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On May 16, 2014, Administrative Law Judge Donna Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

On April 12, 2016, following an unpublished remand order by the Board,[1] the judge issued the attached Order Ratifying and Adopting Decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, to amend the remedy,[3] and to adopt the recommended order as modified and set forth in full below.[4]

[1] The Board's Order remanding this proceeding to the judge, available at https://www.nlrb.gov/case/07–CA–086624, rejected the Respondent's argument that the Regional Director lacked authority to issue the complaint in this matter because she was appointed at a time when the Board lacked a quorum, as this argument is factually erroneous. Further, the Board found it unnecessary to reach the Respondent's argument that the Acting General Counsel lacked authority to prosecute this case. See id. at 3 fn. 4. This argument is now moot as on April 15, 2016, General Counsel Richard F. Griffin, Jr. issued a Notice of Ratification stating the following: "After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act."

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

We note that *Monmouth Care Center*, 354 NLRB 11 (2009), a two-member decision cited by the judge, was incorporated by reference in a three-member panel decision following issuance of the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (holding that under Sec. 3(b) of the Act, a delegee group of at least three members must be maintained in order to exercise the delegated authority of the Board). See *Monmouth Care Center*, 356 NLRB 152 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012).

Contrary to the judge and his colleagues, Chairman Miscimarra would not find that the Respondent violated Sec. 8(a)(5) by failing to provide relevant information requested by the Union on July 31 and November 30, 2012. In his view, the summary the Respondent provided to the Union on January 9, 2013, was a sufficient response to those requests. Chairman Miscimarra would find, however, that the Respondent violated Sec. 8(a)(5) and (1) by unreasonably delaying its response to those requests.

[3] The remedy section of the judge's decision is amended as follows. Backpay for the unfair labor practice strikers denied immediate reinstatement on November 30, 2012, shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950)—not, as the judge ordered, in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). Loss of earnings and other benefits resulting from the Respondent's unlawful unilateral changes shall be computed in accordance with *Ogle Protection Service*, supra, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). So shall reimbursements for any expenses resulting from the Respondent's failure to make required contributions to the Michigan Conference of Teamsters Welfare Fund, including reimbursement of amounts that employees were required to contribute for coverage under the Fund following the Respondent's unlawful implementation of its final offer on about June 23, 2012. Benefit fund contributions shall be made in the manner set forth in the remedy section of the judge's decision. Because the Board's powers under Sec. 10(c) are strictly remedial, Chairman Miscimarra would deduct from any make-whole award to the Union's Welfare Fund the amount that the Fund would have paid out for covered claims but did not pay out as a result of the Respondent's unlawful implementation of its final offer in the absence of a valid impasse. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (holding that the purpose of the Board's remedies is the "restoration of the situation, as nearly as possible, to that which would have obtained but for" the unfair labor practices).

[4] Although the Respondent excepted to the judge's finding that it unlawfully refused to bargain with the Union on request, it does not argue that the judge's recommended affirmative bargaining order is improper even assuming the Board affirms the judge's finding. We therefore find it unnecessary to provide a specific justification for the affirmative bargaining order. See *Lily Transportation Corp.*, 363 NLRB No. 15, slip op. at 3 fn. 5 (2015), enfd. 853 F.3d 31 (1st Cir. 2017); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001); see also *Scepter Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002).

In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 12–16, Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings. We

In adopting the judge's findings, we clarify the following point. During the course of bargaining, the Union requested detailed cost-savings calculations from the Respondent after the Respondent repeatedly stated it was losing money. The Respondent failed to respond to these requests or produce that information during bargaining. While the judge appropriately relied on the Respondent's failure to respond to the Union's requests as evidence that the Respondent did not bargain in good faith to a valid impasse,[5] and we rely on it as such, the judge mistakenly concluded that this failure constituted a separate violation of Section 8(a)(5) of the Act. The complaint did not so allege. For the same reason, we also disavow the judge's statements in both her 2014 decision and her 2016 order that the Respondent bargained in bad faith. The complaint did not allege bad-faith bargaining, and the parties did not litigate that issue. [6]

ORDER

The National Labor Relations Board orders that the Respondent, Hendrickson Trucking Company, Jackson, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying Local 164, International Brotherhood of Teamsters (the Union) and giving it an opportunity to bargain.

(b) Failing and refusing to immediately reinstate employees who engage in an unfair labor practice strike upon their unconditional offer to return to work.

(c) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the unit employees.

(d) Failing and refusing to bargain on request with the Union as the exclusive collective-bargaining representative of the unit employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the changes in the unit employees' terms and conditions of employment contained in the Respondent's last, best, and final offer that were unilaterally implemented on about June 23, 2012.

(b) Make the unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes implemented on about June 23, 2012, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Make all contractually required contributions to the Union's health and welfare and other funds on behalf of all eligible unit employees, including but not limited to unit employees who worked during the strike and those subsequently denied reinstatement upon the conclusion of the strike, that it has failed to make since about June 23, 2012, if any, and reimburse affected employees for any expenses ensuing from its failure to make the re-

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shall also modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and we shall substitute a new notice to conform to the Order as modified.

[5] Chairman Miscimarra agrees that the parties had not reached a valid bargaining impasse at the time the Respondent implemented its final offer, and therefore the Respondent violated Sec. 8(a)(5) when it implemented the terms of that offer. In so finding, however, he does not rely on several aspects of the judge's analysis. First, Chairman Miscimarra does not rely, as evidence that bargaining had not reached a valid impasse, on the fact that the Respondent did not furnish the Union its 2011 tax return. The judge found that the Respondent had a duty to furnish the 2011 return "once it received" the return on the basis that the Respondent had permitted the Union's accountant to review its tax returns for 2008, 2009, and 2010. Chairman Miscimarra disagrees that by furnishing its tax returns for those 3 years, the Respondent incurred an ongoing duty to provide additional tax returns. He finds there was no such duty. Second, because Sec. 8(d) precludes the Board from dictating any term of a collective-bargaining agreement, Chairman Miscimarra disagrees with the judge's finding that the Respondent's proposal of a judicial rather than an arbitral forum to resolve grievances at step 4 of the grievance process "constituted a lack of good-faith bargaining." See *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970) ("It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strength of the parties."). Finally, Chairman Miscimarra does not rely on *National Extrusion & Mfg. Co.*, 357 NLRB 127 (2011), or *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), cited by the judge.

[6] Member McFerran joins her colleagues in affirming the judge's finding that, under the totality of circumstances, the parties were not at impasse when the Respondent unilaterally implemented its final offer. In doing so, Member McFerran emphasizes that, although certain elements of the parties' negotiations indicated good-faith bargaining – the parties held at least seven negotiating sessions over several months, enlisted the aid of a federal mediator, and made some progress toward an agreement, among other things—the cost-savings information the Respondent failed to provide related directly to what became the sticking point in the negotiations; that is, the Respondent's justification for the substantial financial concessions it was seeking from the Union.

Member McFerran also observes that even if the Respondent were correct that the judge erred in finding that the Respondent's failure to provide that requested cost-savings information independently violated Sec. 8(a)(5) and (1) of the Act because it was not properly alleged, it still would be appropriate to rely on the Respondent's failure as a basis for concluding that the parties did not reach a valid impasse. See *Decker Coal Co.*, 301 NLRB 729, 740 (1991).

Last, although Member McFerran agrees with the judge's finding that the Respondent unreasonably insisted that all contractual disputes be resolved through court litigation rather than arbitration, even in the absence of that finding she would conclude that the Respondent failed to establish that the parties reached a valid impasse.

quired payments, with interest, as set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, offer all unit employees who engaged in the unfair labor practice strike beginning June 25, 2012, and were not immediately reinstated upon their unconditional offer to return to work full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, terminating, if necessary, any replacements who occupy those positions.

(e) Make the unfair labor practice strikers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision as amended in this decision, plus reasonable search-for-work and interim employment expenses.

(f) Compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director of Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(g) Furnish to the Union in a timely manner the information requested by the Union on July 31, 2012, and again on November 30, 2012.

(h) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All drivers, mechanics, mechanics helpers, and parts/utility employees employed by the Respondent at or out of its facility located at 1077 South Toro, Jackson, Michigan, but excluding all guards and supervisors as defined in the National Labor Relations Act (the Act).

(i) Within 14 days after service by the Region, post at its facility in Jackson, Michigan, a copy of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 2012.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 11, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT change your terms and conditions of employment without first notifying Local 164, International Brotherhood of Teamsters (the Union) and giving it an opportunity to bargain.

WE WILL NOT fail and refuse to immediately reinstate employees who engage in an unfair labor practice strike upon their unconditional offer to return to work.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT fail and refuse to bargain on request with the Union as the exclusive collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the changes in your terms and conditions of employment that were unilaterally implemented on about June 23, 2012.

WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits resulting from our unlawful unilateral implementation of terms and conditions of employment on about June 23, 2012, plus interest.

WE WILL, within 14 days from the date of the Board's order, offer all employees who engaged in the unfair labor practice strike beginning June 25, 2012, and were not immediately reinstated upon their unconditional offer to return to work full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, terminating, if necessary, any replacements who occupy those positions.

WE WILL make the unfair labor practice strikers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate all employees who suffered loss of earnings as a result of our unlawful unilateral changes on about June 23, 2012, or of our failure to immediately reinstate unfair labor practice strikers upon their unconditional offer to return to work for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director of Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL make all contractually required contributions to health and welfare and other funds on behalf of all eligible unit employees, including but not limited to unit employees who worked during the strike and those subsequently denied reinstatement upon the conclusion of the strike, that we have failed to make since about June 23, 2012, if any, and reimburse you, with interest, for any expenses ensuing from our failure to make the required payments.

WE WILL furnish to the Union in a timely manner the information requested by the Union on July 31, 2012, and again on November 30, 2012.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All drivers, mechanics, mechanics helpers, and parts/utility employees employed by us at or out of our facility located at 1077 South Toro, Jackson, Michigan, but excluding all guards and supervisors as defined in the National Labor Relations Act (the Act).

HENDRICKSON TRUCKING COMPANY

The Board's decision can be found at https://www.nlrb.gov/case/07–CA–086624 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Patricia A. Fedewa, Esq., for the General Counsel.
Timothy J. Ryan, Esq., Linda L. Ryan, Esq. and *Katherine J. Donohue, Esq.,* for the Respondent.

ORDER RATIFYING AND ADOPTING DECISION

On May 16, 2014, I issued a decision in this case. Subsequently, Hendrickson Trucking Company (Respondent) filed exceptions and a supporting brief, and the General Counsel filed an answering brief with the National Labor Relations Board (the Board). Respondent argued, inter alia, that I was appointed at a time when the Board lacked a quorum, that my appointment was therefore invalid and that I lacked the lawful authority to preside over the hearing, issue a decision or otherwise act in this proceeding.

On April 6, 2016, the Board issued an order remanding this case back to me with full authority over this matter to "decide whether or not to ratify [my] prior actions herein, to adopt or modify [my] prior decision, or issue an entirely new decision."[1] The Board's order also stated that "[a]bsent a specific order by [me], this remand does not give the parties the opportunity to relitigate any matter previously presented for decision, nor does it give any party the right to expand the scope of the issues previously presented."

The Board agreed with the Respondent's contention that under the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Board lacked a valid quorum at the time that it originally approved my appointment in April 2013. However, the Board pointed out that on July 18, 2014, it ratified all administrative and personnel decisions made from January 4, 2012, to August 5, 2013. It also concluded that its ratification expressly authorized my appointment.[2] However, since my decision in this case was issued and transferred to the Board prior to the Board's July 18, 2014 ratification of my appointment, I was divested of jurisdiction as well as the opportunity to consider whether or not to ratify my prior actions. In considering all of these circumstances of this case, including its complexity, number of alleged violations, the hearing and lengthy decision, exceptions filed and Respondent's intention to continue to litigate my authority, the Board, "in an effort to remove any lingering questions," decided to remand the case to give me the opportunity to consider the issues presented now that my appointment has been fully confirmed by a legally valid five-member Board.

This complex case involves many alleged violations of the National Labor Relations Act (the Act), Section 8(a)(1), (3), and (5), including alleged unilateral changes to terms and conditions of employment without a lawful impasse; subsequent failure and refusal to bargain collectively and in good faith towards a new collective-bargaining agreement; failure and refusal to provide relevant and necessary information requested by the Charging Party Union; failure and refusal to reinstate strikers after they unconditionally offered to return to work following an unfair labor practice provoked by Respondent); bad-faith bargaining. Respondent denied violating the Act in any way, and raised several affirmative defenses. Pursuant to the Board's remand order and my now valid ratification, authority and jurisdiction over this case, I have fully reviewed my decision in light of the alleged allegations and Respondent's defenses. In doing so, I have determined that my decision (including the findings of fact, analysis, credibility determinations, conclusions and recommended order) is based on the entire record, and that it remains correct and should stand on its entirety.

IT IS SO ORDERED that all prior actions performed by me in this case are hereby ratified and that my decision issued in this case on May 16, 214, is hereby adopted in its entirety for the reasons stated above and in the Board's remand order issued on April 6, 2016.

Dated, Washington, DC April 12, 2016

Patricia A. Fedewa, Esq., for the Acting General Counsel.
Timothy J. Ryan, Esq., Linda L. Ryan, Esq., and *Katherine J. Donohue, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA DAWSON, Administrative Law Judge. This case was tried in Detroit, Michigan, on May 21–22, 2013. The Acting General Counsel[1] issued the complaint in the first case on November 21, 2012, and an order consolidating the cases and a consolidated amended complaint on March 27, 2013 (the complaint). The complaint alleges that Hendrickson Trucking Company (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by unilaterally implementing the terms in its last collective-bargaining agreement offer without bargaining with the Union to a good-faith impasse. It also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by subsequently failing and refusing to bargain collectively towards a new collective-bargaining agreement and failing and refusing to respond to information requested by the Union. Finally, the complaint alleges that bargaining unit strikers engaged in an unfair labor practice strike and Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate those strikers after they made an unconditional offer to return to work. Respondent filed its answer and amended answer denying all essential allegations in the complaint. Respondent also raised an affirmative defense which will also be addressed later in this decision.

On the entire record, including my observation of the demeanor of all witnesses, and consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Michigan corporation, is engaged in the interstate transportation of aggregate materials, and maintains an office and facility in Jackson, Michigan. During the calendar year ending December 31, 2011, Respondent derived gross revenues in excess of $1 million for the transportation of freight in interstate commerce under arrangements with and as an agent for common carriers, including Michigan Materials and Aggregates Company, d/b/a Stoneco of Michigan, Inc., an entity which operates to and from points outside the State of Mich-

[1] Pursuant to the Board's remand order, I am only addressing the issues raised by Respondent regarding the validity of my prior actions and decision in this case. The Board has already made determinations regarding Respondent's allegations and arguments about the validity of appointments ad authority of the Regional Director and Acting General Counsel in this case. (Board Order Remanding.)

[2] The Board explained in its order remanding this case that it took this ratification action on July 18, 2014, "in an effort to resolve any continuing uncertainty regarding various actions taken during the time the board lacked a quorum." See board remanding (April 6, 2016)Zasssssssssssssssssssssssssssssssssx.

[1] For brevity purposes, the Acting General Counsel and counsel for the Acting General Counsel will be referred to as the "General Counsel."

igan. I find, and Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Facts

A. The Parties

Respondent is a trucking company which transports aggregate materials (such as sand, gravel, large rocks, stone, etc.). It operates as a seasonal employer that generally employs most of its employees from April 1 (when business picks up) through December 1 (when business slows down/winter slow down). Therefore, between about December 1 of each year and April 1 of the next year, Respondent lays off a number of its employees, including drivers, mechanics and parts/utility workers. On or shortly after April 1 of each year, Respondent normally rehires the laid-off employees. The layoff and rehire times might vary from year-to-year, based on the amount of work available (e.g., the slow season may begin the end of November), and Respondent has historically used a seniority list to determine who is laid off and rehired. (Tr. 44, 406.) At all times material, Respondent's primary agents and/or supervisors have been: James (Jim) Hendrickson, owner; Thomas James Hendrickson (T. J. Hendrickson), vice president and in-house counsel; Jack Durbrow (Durbrow), chief financial officer/treasurer; and Ryan Hendrickson (R. Hendrickson), mechanic supervisor. T. J. Hendrickson, Jack Durbrow, and R. Hendrickson served as Respondent's bargaining representatives for the current negotiations at issue in this case.

Since about 1977, Respondent has recognized the Union as the exclusive collective-bargaining representative of the bargaining unit (the unit): consisting of:

> All drivers, mechanics, mechanics helpers, and parts/utility employees employed by Respondent at or out of its facility located at 1077 South Toro, Jackson, Michigan, but exclusive of all guards and supervisors as defined in the Act.

(GC Exhs. 1(s) and 4.)[2] During the relevant time period,[3] the unit included approximately 20–21 employees. (Tr. 161; R. Exh. 12.)

In recent bargaining history, the parties have reached successive collective-bargaining agreements in 2002, 2005, and 2008, the most recent of which was effective from April 1, 2008 to March 31, 2012. (GC Exh. 4.) Prior to this complaint, the parties have not been involved in an unfair labor practice dispute with or before a third party since 2002 when they appeared before the Aggregate Carrier Association, pursuant to their collective-bargaining agreement at the time. This association was an aggregate trucking/transportation industry organization that included arbitration services in its member dues for employers and unions.

During most of the relevant time period, Alan Sprague (Sprague) served as the Union's president and chief negotiator until the Union removed him from this position on or about January 30, 2013. (Tr. 34.) Thomas Mathews (Mathews) served during the same time period as the Union's steward and recording secretary (Tr. 247–248). Subsequently, a trustee was appointed for the local Union.

B. Overview of the Expired Collective-Bargaining Agreement-Key Provisions

As stated, the last collective-bargaining agreement expired on March 31, 2012. It covered a broad range of terms and conditions, but several areas (employee health and welfare insurance, employee 401(k) retirement plan, overtime calculations, and dispute resolution) proved to be main issues of contention when the parties began negotiating for a successor agreement in February 2012. To a lesser extent, the parties also discussed other issues during their negotiations for a new collective-bargaining agreement, such as a continued freeze on wage rates, voluntary layoffs during the off season, and use of earned vacation, which will be discussed in this decision. (GC Exh. 4.) Several of the key areas or provisions addressed during bargaining are set forth below.

The health and welfare section of the expired agreement required Respondent to make contributions, specified by the expired agreement (ranging from \$242.75 to \$267.85 per week per employee), into the Michigan Conference of Teamsters Welfare Fund (the MCTW Fund) for each unit employee who had been on the payroll 90 days or more. Generally, Respondent was to make all healthcare insurance contributions for each employee for each week worked by that employee. Respondent paid lower contributions (for a certain number of weeks based on the number of weeks worked) into a separate plan (the "ENN-NN Plan") for seasonally laid-off employees based on a formula set forth in the provision. The expired agreement also allowed employees to opt out of the plans covered by the Fund provided they submitted proper proof of other healthcare coverage pursuant to the Fund's requirements. Employees who opted out would receive \$1-per-hour increase in pay. (GC Exh. 4, art. 14.)

Regarding the retirement plan, the expired agreement called for Respondent to match dollar-for-dollar each unit employee's contribution up to a certain percentage of gross wages, pursuant to a formula set forth in the agreement. (GC Exh. 4, art. 15.)

The expired agreement described overtime pay as, "[a]ll time worked in excess of forty (40) hours in any one (1) week and/or eight (8) hours in any one (1) day, shall be paid at the rate of one and one-half (1-1/2) times the regular hourly rate." (GC Exh. 4, schedules A and B.) It is undisputed that unit employees were paid overtime at 1-1/2 times the regular hourly rate after working in excess of 8 hours a day (vs. 40 hours).

The Agreement required the parties to resort to arbitration if a disputed matter was not settled during step 3 of the grievance process. Pursuant to step 3, the matter would be submitted to a Federal mediator assigned to the area, and if not settled, "[t]o arbitration where the arbitrator shall be a person or procedure mutually agreed upon by both the Employer and the Union." If the parties did not agree on either an arbitrator or arbitration

[2] Abbreviations used in this decision are as follows: "Tr." For Transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for General Counsel's Brief; and "R. Br." for Respondent's Brief.

[3] The relevant time period is 2012, unless otherwise specified.

process within 5 days, then the dispute/grievance would be submitted to the "Joint State's Committee." The fees and expenses of the arbitrator would be shared equally by the parties. (GC Exh. 4, art. 5.) However, the parties had never utilized arbitration under the expired agreement. As stated above, the last time the parties submitted a dispute to a third party was in 2002.

According to the expired agreement, during the period from December 1 through April 1 (each year) in the succeeding year, Respondent could reduce the size of its work force (during the slow season discussed above), and give up to 10 employees the opportunity to voluntarily take a layoff from employment. This "voluntary layoff" was offered by seniority, allowing the most senior to the least senior employee on the list to take a voluntary layoff. Recall of those laid off, on April 1, was also based on seniority. (GC Exh. 4, art. 11.)

Finally, regarding vacation, employees were allowed up to 3 weeks of vacation, depending on their tenure (1 week for 1–3 years; 2 weeks for 3–10 years; and 3 weeks for 10–15 years). The selection for vacation was done from April 1–30 each year based on seniority. Any requests made thereafter had to be made 4 weeks prior to the time requested off, and would be granted on a first come, first serve basis, "contingent with the efficient operation of the business." It is undisputed that Respondent rarely allowed employees to take off more than 1 week during the busy season. Although vacation time was unpaid, Respondent agreed to pay employees "$1.00 per hour for all hours worked for vacation and Holidays." (GC Exh. 4, art. 13.)

C . February through June—Negotiations for Successor Collective-Bargaining Agreement

On January 4, Respondent notified the Union of its intent to terminate the Agreement on April 1. On January 20, the Union advised Respondent of its desire to continue the existing agreement and to negotiate changes to it. (GC Exhs. 5–6.) In summary, bargaining began on February 27 and ended on June 13 (after seven in-person sessions) after Respondent declared the parties had reached an impasse, and subsequently implemented its second final offer. There is no real dispute about what areas the parties did and did not agree upon. There is, however, some factual dispute as to whether the Union requested, on several occasions during the negotiation sessions, a breakdown of cost savings associated with several of Respondent's economic proposals, and whether Respondent provided the Union with additional cost saving information.

1. First bargaining session—February 27[4]

On February 27, the parties' respective negotiating teams met to begin bargaining for a new/successor collective-bargaining agreement. As previously stated, Respondent's team consisted of T. J. Hendrickson, Durbrow, and R. Hendrickson. The Union's team included Sprague and Mathews.[5] During this first session, the parties spent most of their time exchanging and explaining their initial proposals. The parties used the expiring collective-bargaining agreement as a framework for their proposed changes. In summary, Respondent was concerned about saving money, claiming that its expenses were increasing and that it had been losing money. Its mantra, repeated throughout negotiations, was "we need to stop the bleeding." By contrast, the Union believed that it had sacrificed wages and many other benefits in past years in attempts to help Respondent save money. Accordingly, its goal was to restore some of those lost wages and benefits in the new agreement.

Respondent proposed the following changes: eliminating payroll dues deduction (art. 1); increasing the probationary period from 90 days to 1 year, with no placement on the seniority list until after 1 year (art. 1, 11); eliminating layoffs for those employees with the highest seniority during the off-season (December 1-April1) (art. 11, sec. 5); eliminating the equipment list (art. 11); reducing vacation time to 1 week during the busy period, and reducing vacation pay from $1 per hour to $.50 per hour (art. 13); requiring all employees to pay 25 percent of their health insurance premiums, eliminating the formula to pay insurance in the off-season and increasing the time an employee must be employed before healthcare would be provided from 90 days to 180 days (art. 14); and eliminating pay for travel time (of 50-60 miles) "in the morning from the shop to the jobsite and/or pit." (Art. 28.)[6] Additionally, Respondent proposed that it eliminate its match to employees' 401(k)/retirement plans (art. 15). It also recommended that overtime calculations be changed from daily overtime beginning after 8 hours to weekly overtime to begin after 40 hours. disputes, Respondent offered that in the event step 3 failed to resolve conflicts, the dispute would be referred to "TRIAL," upon the request of either party (rather than to arbitration or the Joint State's Committee) (art. 5). (GC Exh. 7.) Finally, Respondent recommended the elimination of a practice not included in the expiring agreement- "pick'n'pass," which allowed senior employees to decline work so that it would be passed down to a less senior employee (Tr. 43).

The Union proposed the following: a 3-year contract; eliminating the super seniority provision which places the chief union steward at the top of the seniority list (art. 2); amending the contract so as not to allow Respondent to deny any time off for vacation requested before April 30; increasing regular hourly wage rates ($1 in year one, $.75 in year 2, and $.50 in year 3); increasing the hourly wage rates of new hires (from $10 to $12 the first 31 days, from $12 to $14 days 32 to 60, $14 to $16 days 61 to 180, and the full rate after 180 days (schedule A); instituting employer provided health insurance coverage year-round (and not just based on the number of days an employee

[4] The bargaining sessions refer to in-person negotiation meetings, and not intermittent exchanges of proposals, telephone conversations, or other correspondence between the parties. There were seven of these in-person sessions between February 27 and June 13, 2012.

[5] These individuals represented the negotiating teams for Respondent and the Union, and were present for all of the in-person bargaining sessions through the June 13 session.

[6] "Article" and "Schedule" refer to the article numbers and schedules in the parties' most recent contract which expired on March 31, 2012, and also correspond to those set forth in the proposals exchanged during bargaining.

worked) (art. 14); implementing a tool allowance for mechanics of $500 per year (schedule A); and revising the arbitration provision to require hearings before the Western Michigan Industrial Board (Industrial Board) (art. 5). (Tr. 256–258; GC Exh. 8.)

At this meeting, Respondent explained that it needed to save money through its proposals, and that "according to the papers, everybody [was] paying," referring to a reported trend that most or all employees were now contributing to their healthcare insurance costs. In response to Respondent's claim that it desperately needed to save money, Sprague requested that the Union be allowed to review Respondent's "books," referring to its financial records. Respondent agreed.

2. Union accountant's report on Respondent's financial status

On March 27, the Union's accountant, Gary Kushner (Kushner) and his assistant met with Durbrow to go over Respondent's books. Kushner reviewed Respondent's tax returns for years 2008 through 2010, and discussed Respondent's financial situation with its managers.[7] On March 13, he sent Sprague his report, which Sprague did not share with Respondent or his union membership.[8] This report reflects that Respondent made a small profit in 2008 ($6843), a small loss in 2009 ($18,072), and larger profit in 2010 ($136,573).[9] Its total assets decreased somewhat over the 3 years analyzed, but the liabilities decreased as well, and the stockholder's equity remained fairly constant in 2008 and 2009, but rose significantly (from an average of $80,000 to $209,000) in 2010. Current assets decreased slightly over this 3-year period, but current liabilities decreased significantly. Working capital was down from $83,664 in 2008 to $67,014 in 2009, but rose sharply in 2010 to $215,553. Of note, stockholder's equity also rose dramatically in 2010 to $209,494 (from $72,921), and retained earnings rose to $207,494 in 2010 (from $70,000 in 2009). Management shared its concerns about needing to replace aging equipment, increasing fuel costs, having received 45 percent of its 2011 business from one customer, and having to significantly reduce its administrative staff. Kushner also reported related-party transactions including real estate and trucks owned by related companies, such as The Hendrickson Brothers, LLC and leased to Respondent for fair market value or less, and four acres of land purchased by its real estate entity for Respondent's use. This report was not controverted at the hearing. (GC Exh. 27.)

Sprague testified, and the evidence supports, that he essentially told his membership and Mathews that Respondent had made a profit in 2008 and 2010, and lost money in 2009.

3. Second bargaining session—April 10

When the parties met for a second session on April 10, Respondent initially presented the same February 27 proposal with an April 10 date and cover letter. (GC Exh. 9.) The parties reached several tentative agreements at this meeting, albeit many of them involved only grammatical, spelling, and contextual language changes that Respondent had already made in its initial proposal.[10] However, Respondent agreed to withdraw its provision recommended on February 27, relating to selection and notice of vacation days, and a decrease from $1 to $.50 per hour paid to employees for all hours worked for vacation and holidays (i.e., the parties kept the vacation selection provision in art. 13 of the expired agreement). (See also GC Exhs. 4 and 10, art. 13.)

As in the first bargaining session, Respondent continued to assert that it was not profitable, and needed to save money with its proposals. On the other hand, the Union expressed its frustration that it had made numerous concessions with previous contracts in recent years—it "[hadn't] had any wage increases . . . [had] taken reductions in insurance . . . changed the insurance plan . . . done everything to help [Respondent]." According to Sprague, since Respondent had not provided tax returns for 2011, and since tax returns for 2008 and 2010 reflected profits, he asked Respondent how much money it expected to save with its various proposals, including overtime calculation changes and elimination of the 401(k) match. Sprague also asked Respondent's bargaining team, ". . . when you say you need to save . . . [h]ow much—what do you need? $25,000, $50,000, $175,000?" In response, Durbrow said, "[Y]eah, 75; 75 sounds good, $75,000." Sprague recalled that when he asked for specific numbers, Durbrow said that Respondent would probably save about $20,000 on the 401(k) match, about $25,000 for the overtime revision, and about $40,000 with employee healthcare contributions. Sprague believed that Durbrow was "just throwing out numbers," and asked for documentation and the underlying numbers to support those figures. Regarding the 401(k) program, Sprague did not know how many unit employees participated, but did not believe that many did since there had been "problems" with the retirement plan.[11] (Tr. 209–211.)

Mathews' testimony generally corroborated Sprague's testimony that Sprague repeatedly asked Respondent's representatives for documentation to support their estimated cost savings totals of $75,000 to $100,000. The only differences were that Mathews recalled Durbrow giving them a $26,000 total for cost savings on the new overtime calculations, and that Durbrow did not respond with estimated savings for individual proposals until May. For reasons addressed below, I credit the testimony of Sprague and Mathews that Sprague began asking how much

[7] Kushner reported that since Respondent did not use a certified public accountant, the only documents available were the corporate income tax returns. Respondent provided several past years' worth of returns, but Kushner focused on those for 2008–2010. At that time, Respondent had not filed tax returns for the 2011 tax year. (GC Exh. 27.)

[8] There is no evidence, however, that Respondent asked to see this report.

[9] Sales from 2008 to 2009 took a downward turn ($4,381,198 to $2,392,395), but turned back upward in 2010 (to $3,108,682). Kushner also referred to a 2001 analysis previously prepared by his office for comparison purposes. (Tr. 32, 318, 332–333; GC Exh. 27.)

[10] The tentative agreements/provisions had the initials "TA" circled and next to them. (Tr. 86.) The parties kept these tentative agreements through all of the subsequent proposals.

[11] Sprague explained that many of the unit employees stopped participating in the 401(k) program after policy change several years ago which precluded them from withdrawing all contributions (theirs and Respondent's contributions) from their accounts at the end of each season.

Respondent expected to save with its proposals early on in the bargaining process.

There is no dispute that Sprague believed that Respondent had not been trying to generate business, and asked Respondent's team when they were going to "get off [their] duff and go out and get some work," referring to the fact that he had recently helped Respondent get an oil field contract that had generated about half a million dollars in revenue. Furthermore, Sprague thought that Respondent might be trying to recoup $100,000 that it had paid for a piece of property in the previous year.[12] (Tr. 69—71.)

Sprague also recalled that he first recommended an opt-out provision in which Respondent would pay unit members $1 more an hour if they opted out of the health and welfare plan. Respondent did not dispute that it rejected the opt-out option because Durbrow thought it would be "too complicated" and involve too much paperwork to process employees who volunteered to opt out. In fact, Respondent had offered an opt-out option for employees in the expired agreement, but encountered problems with bargaining unit employees being approved for opt out by the MCTW Fund.[13] There is no evidence that Respondent specifically addressed or provided any counteroffers to the Union's initial proposals. According to Respondent's witnesses they considered and summarily rejected them.

4. Post-April 10 communications

On about April 13, Sprague faxed an offer to Respondent for a 1-year contract; freeze on wages; Respondent paid health care premium increases starting on April 1; and agreed to changes (tentative agreements) made on April 10. It is undisputed that Sprague's intention was to otherwise maintain the status quo, or rather, extend the expired agreement for 1 year, with the aforementioned changes. He testified that the busy season was fast approaching, and he wanted to reach an agreement that would buy additional time for the Union to receive and review Respondent's 2011 income tax returns, get the information on the cost savings associated with Respondent's economic proposals, and find out how profitable (or not) Respondent really was. He explained that he was not abandoning the Union's original proposals, but wanted "to get [Respondent] off the dime . . . to try to get negotiations going. . . ." (Tr. 75-77; GC Exh. 10.)[14]

5. Third bargaining session—April 25

During the third session, Respondent gave the Union an updated proposal. (GC Exh. 11.) In this proposal, Respondent withdrew most of its initial proposed changes (provided on February 27) such as: eliminating payroll deductions (art. 1); increasing the probationary period from 90 days to 1 year and not being placed on the seniority list until after 1 year (arts. 1, 11); eliminating the formula to pay health and welfare insurance in the off season (art. 15); and eliminating payment to employees for "travel time in the morning from the shop to the jobsite and/or pit" (art. 28). Respondent also agreed to the Union's proposal to eliminate the super seniority provision for the union steward (art. 2). Additionally, under the health and welfare provision, Respondent amended its initial provision to reduce the employee premium contributions to 20 percent for each driver and 15 percent for each mechanic (art. 14), as opposed to the initial recommendation of 25-percent contribution from all unit members. Respondent also introduced a formula to pay insurance in the off-season (which it had done in the former contract), with the employees contributing the aforementioned percentages. Regarding the retirement plan, Respondent refused to add back the 401(k) match contributions, but added the following language: "The Employer match will be suspended until Hendrickson Trucking Company returns to profitability." Respondent maintained its stance on the revised overtime calculations. (Id.)

Respondent noted under article 5, grievance and arbitration procedure, that it was waiting for additional information about the Industrial Board (as a method for resolving grievances) and wanted to attend an Industrial Board hearing.

Sprague testified that he once again asked Respondent for documentation to show estimated cost savings relating to elimination of the 401(k) match; revision of the overtime calculations; and employee contributions to the healthcare plan. He said that Durbrow responded with, "stop the bleeding," and asked what the Union was going to do to help save money. (Tr. 80-81; 265.) The parties did discuss the Union's offers to the extent of the contract length of 1 year and to explore opt-out language for health care insurance, as well as the 401(k) match, but did not reach an agreement. At that point, T. J. Hendrickson suggested that the parties obtain a mediator to assist with negotiations. Sprague said that he would get the rules of procedure for the Industrial Board for arbitration of disputes, and to try to set up a time when Respondent could observe one of the Board's meetings.[15]

6. The Union rejects Respondent's recent proposals and holds ratification and strike votes

On about April 27, Respondent sent the Union another updated proposal with no recognizable changes, except an attached addendum to a MCTW Fund participation agreement. This addendum stated, in pertinent part, that for the period April 1, 2012, through March 31, 2015, employer contributions to the MCTW Fund "are to be made for each week on behalf of a participant who worked, or is compensated for any portion of two or more days in the contribution week. . . ." The addendum

[12] There is no dispute that Sprague helped Respondent pick up this oil field contract. However, evidence revealed that a company connected to Respondent, Hendrickson Brothers, LLC, had purchased the $100,000 piece of property that Respondent had been renting from a prior owner, and that Respondent was now renting it from Hendrickson Brothers, LLC.

[13] This health and welfare fund was the provider of health, life, short and long-term disability, dental and vision benefits for the unit members. Respondent claimed that when it offered this option in the past, only four of five bargaining unit members were initially approved, and the Fund reversed approval for the fifth applicant due to some kind of error in processing the application. (Tr. 74.)

[14] Respondent's counsel objected to the admission of GC Exh. 10 because he did not believe that it was ever sent to Respondent. I overruled the objection since the document contained the fax confirmation time and date stamp showing that it was sent to Respondent's fax number. None of Respondent's witnesses refuted receiving this proposal, and Respondent did not raise the matter further in its brief.

[15] Due to scheduling issues, a meeting was never set up.

contained signature lines for Respondent, the Union, and the board of trustees for the MCTW Fund. (GC Exh. 12.)

On about April 29 or 30, the bargaining unit met and voted on several items. The first was a vote rejecting Respondent's recent proposals. The second was a vote on a ratified union proposal to present to Respondent. This ratified proposal included a 1-year contract, acceptance of the status quo with a freeze on wages, and unit members' offer to pay for the annual increase in healthcare insurance premiums of about $15 per employee each week on a pretax basis. The third vote was a "secret ballot strike vote," which passed overwhelmingly. Sprague and Mathews explained that the "secret ballot strike vote" was a tool that it commonly used at the beginning of or during negotiations to determine if the bargaining unit would be willing to strike if necessary. According to Sprague, the Union believed this strike vote would get Respondent to seriously consider the Union's proposals, and get the parties through the busy season and give them time to explore "where they were during the year."

Respondent claimed to have considered and rejected all of the Union's proposals, including this one. There is no evidence that the parties sat down and discussed the Union's preratified proposal. (Tr. 87–92; 267–268.)

Thus far, the Union had presented three counterproposals to Respondent's initial proposals, including the opt-out option for healthcare insurance, employee contributions of $15 per week towards increased healthcare premiums, and use of the Industrial Board for dispute resolution. Respondent agreed to one of the Union's initial proposals- to eliminate the super seniority for the union steward. It had also withdrawn several of its initial provisions, reduced the amount of employee contributions toward the health and welfare insurance premiums, and added that the employer 401(k) match would be suspended (instead of indefinitely eliminated) only until Respondent reached profitability.

7. Fourth bargaining session—May 16

The parties re-convened on May 16, meeting for the first time with Federal mediator, Kevin Brahaney (Brahaney). Brahaney explained his role and met with the parties individually. Mostly, the parties brought him up to date on their various proposals; they did not exchange any new ones.

According to Durbrow and T. J. Hendrickson, Durbrow provided everyone, including Sprague and Mathews, with copies of a spreadsheet reflecting 8 years of Respondent's finances, with an understanding that they would return all copies to him at the end of the meeting. According to Durbrow, this spreadsheet also included projected figures generated by Respondent's accounting system for 2011, including a $138,000 loss for 2011, in lieu of the yet to be completed and filed 2011 tax returns. Of note, this was a huge contrast to Respondent's actual profit in 2010 of over $136,000, and to the projected sales in 2011 of over $3.3 million. Durbrow admitted that this data was not a complete income or profit and loss statement. (Tr. 369–370; R. Exh. 31.) T. J. Hendrickson testified that it was his practice to write the dates on undated documents before they are distributed, as he did with this spreadsheet on May 16. Sprague and Mathews, however, had no recollection of seeing or receiving this document prior to the hearing.

Contrary to assertions by Sprague and Mathews, Durbrow testified that Sprague only requested cost saving information related to Respondent's proposals on only one occasion during their contract negotiations- at this May 16 bargaining session. He maintained that this spreadsheet was provided to show why Respondent needed to save at least $100,000, and that the information contained therein supported the figures he had verbally provided to Sprague. Durbrow finally admitted, however, that this spreadsheet did not show how much (or an estimate of how much) each of the economic provisions (the elimination of the 401(k) match, overtime after 40 hours, and employee contributions to healthcare) would save. Of note, he also did not recall that this was the first meeting with the mediator. (Tr. 173–174, 208–209, 345–347.)

Respondent asserts that affidavits provided by both Sprague and Mathews to the NLRB, as well as notes provided by Mathews, support Durbrow and T. J. Hendrickson's testimony that they gave Sprague and Mathews copies of this spreadsheet on May 16, and that May 16 was the only date on which the Union requested or mentioned cost savings specific to each of their economic provisions.[16] I disagree. As previously stated, I credit Sprague's and Mathew's testimony on these points over that of Durbrow and T. J. Hendrickson. Neither Mathews nor Sprague claimed to recall all of the details and dates regarding the bargaining sessions, and they both credibly testified that their affidavits and notes did not represent all that was said or done during the negotiation meetings. In fact, notes taken by Sprague at a later session, and entered into evidence, were sparse and clearly did not include all that was discussed when compared to the testimony of all witnesses. (GC Exh. 28.) Sprague also provided more detail regarding the bargaining sessions than Respondent's witnesses. Furthermore, testimony revealed that Mathews' bargaining notes and affidavit and Sprague's affidavit, indicated that the Union brought up the issue of cost savings on May 30, and not May 16 as claimed by Durbrow and T. J. Hendrickson. There was no evidence that these affidavits or notes mentioned or indicated that Respondent had ever provided the union representatives with a spreadsheet or any other documentation showing total or proposal specific cost savings. If Respondent's argument is accepted, then anything that took place or was said during a bargaining session would have been included in these affidavits and notes. Nevertheless, Respondent admits that the Union requested cost savings information to support its proposals at least once during negotiations for a new contract.

Respondent's witnesses implied that this spreadsheet was an adequate response to the Union's questions about cost savings. If Respondent prepared and presented this document to Mathews and Sprague on May 16, or even on May 30, in response to questions by the Union, it is unbelievable that May 16 was the first session during which the union representatives mentioned or asked for cost savings or documentation in support thereof (other than during the first bargaining session when the Union asked for accounting information). There is no evidence of Respondent providing any financial information with-

[16] Mathews' notes were not introduced into evidence.

out a request by the Union. Likewise, it is simply not plausible that Sprague would not have requested cost savings documentation regarding Respondent's economic propositions. These proposals were central to most of the bargaining discussions, and represented a drastic change from similar provisions in the expired agreement.

Thus, the evidence supports my crediting the testimony of Sprague and Mathews that Sprague requested cost savings numbers and documentation on several occasions during the bargaining process.[17]

8. Fifth bargaining session–May 21

The parties met again on May 21, with the mediator, Brahaney, present. Respondent presented a new proposal in which it reverted back to its former recommendation that the parties use the Federal District Court to resolve grievances. (GC Exh. 13.) However, Respondent further reduced the employees' contributions to healthcare insurance to 15 percent towards the cost of each driver's premium (instead of 20 percent) and 13 percent towards each mechanic's and/or mechanic helper's premium (instead of 15 percent), but new hires would not be eligible until 180 days. This was the extent of the revised May 21 proposal. Sprague told Respondent it was "ridiculous" for the parties to resort to Federal District Court for dispute resolution, instead of arbitration or the Industrial Board. He pointed out that the parties had not taken disputes to a third party in years. At that point, Durbrow said, "[W]ell, if that's all it's going to take to get a contract, I'm sure that that can be taken care of, I'm sure that can be handled," and Sprague responded that there were still a lot of other issues on the table. (Tr. 97.)

During this session, Sprague submitted information from the MCTW Fund about the opt-out option, and advised Respondent that the Fund representatives were willing to assist Respondent with the opt-out process and requirements "step by step." Sprague also explained that he knew of two unit members who were interested in opting out, which would save $240 per week times two. T. J. Hendrickson reiterated his belief that there was too much paperwork involved, and that Respondent was not interested in revisiting the opt-out option. Sprague testified that he reminded Respondent that it had not provided information showing cost savings for these provisions. He further explained that the Union needed this information so that it could see how the parties might save money through changes in other parts of the contract. (Tr. 96–97, 101, 114, 164, 174, 282, 318.) For the reasons previously set forth, I credit Sprague's testimony that he requested this information. Regarding the 401(k) match issue, Sprague maintained his belief that only a very small percentage of unit members participated in the plan.

According to Durbrow, about half or a little over half of the bargaining unit employees participated in the 401(k) plan, including Mathews, but provided no evidence that he had provided cost savings calculations or documentation to the Union. (Tr. 362–363.) He also explained that the elimination of the employer 401(k) match, as well as the requirement that employees share in the costs of the healthcare and welfare premiums and overtime calculations, applied to all employees, and not just the bargaining unit. He did not, however, furnish any of this information or a breakdown of how much savings was attributable to the bargaining unit versus nonbargaining unit employees to the Union during negotiations for a new agreement.

9. Respondent's May 23 proposals

On May 23, Respondent faxed the Union a proposal with two options for the Union to consider: (GC Exh. 14.) This proposal only included revised health and welfare and retirement contribution provisions. The first option required employee contributions at the previously proposed 15 percent towards each driver's premium and 13 percent towards each mechanic/mechanic helper's premium. This also included employer and employee contributions into an ENN-NN plan for laid-off employees from the layoff until April 1 or recall at the start of the new season. As an example, this would result in Respondent paying from $240.08-$294.14 of the weekly premiums for drivers and drivers contributing from $42.37 to $51.91 of the weekly premiums during the work season. The second option did not include percentages for employer and employee contributions toward healthcare premiums. Instead, it recommended set dollar amounts for Respondent's contributions of $265.45-$275.50 and drivers' contributions of $17 to $32, with increases over the life of the agreement. Option two only offered laid-off employees 2 weeks of insurance after layoff. Additionally, the second option included an employer match of "$0.50 cents for every dollar the employee contributes up to 3% of the [employee's] gross wages," with the employer agreeing to "match $0.25 cents for every dollar the employee contributes up to 2% percent of the [employee's] gross wages after the first 3% percent of the employees' contributions." This reduction in the employer match (from the match included in the expired contract) would be effective "until the [e]mployer returns to profitability." About 1 or 2 days later, the bargaining unit rejected these options. (Tr. 102–103.)

10. Sixth bargaining session—May 30—Respondent presents its last, best offer

During the parties' sixth bargaining session, with Brahaney present, Respondent submitted its "LAST BEST OFFER" to become effective on Monday, June 4. This last best offer essentially incorporated Respondent's option 1 regarding employer/employee contributions to the health and welfare premiums presented to the Union on May 23, and the provisions included in its May 21 proposed contract. (GC Exh. 15.) Brahaney caucused with each party, but the parties did not reach any agreements during this session. Mathews recalled that Durbrow again stated that Respondent would save $20,000 by not matching the 401(k) plan contributions; $26,000 with overtime begin paid after 40 hours instead of after 8 hours; and about $40,000 with the employee healthcare contributions. Durbrow did not, however, provide any documentation to support these numbers as requested by the Union. According to Sprague and Mathews, Respondent's representatives continued their mantra that they needed the Union to help them save money and to "stop the bleeding." (Tr. 106-108, 272–274.)

When the Union rejected this last best offer at this meeting,

[17] Additionally, I note here my observation that Durbrow waivered in his testimony, and was not entirely forthcoming.

T. J. Hendrickson said, ". . . it looks like we're at impasse." Sprague objected to Respondent's declaration, saying that "I've never said we're at impasse. I don't know where you get we're at impasse. I didn't use that word. We still have a lot of stuff on the table here." (Tr. 108–109.)[18]

11. Respondent presents its "Revised Proposal and Last, Best, and Final Offer" on June 4

The Respondent did not implement its last best offer dated May 30. Rather, on June 4, it faxed and mailed a "Revised Proposal and Last, Best, and Final Offer," to be effective on Monday, June 11. (GC Exh. 16.) In the cover letter, T. J. Hendrickson stated that Respondent understood that the Union's basis for rejection of its last offer on May 30 was that it was unwilling to agree to the proposals on the elimination of the 401(k) match, health insurance contributions, overtime calculations, and the grievance procedure. T. J. Hendrickson also asserted its belief that "throughout our negotiations you have maintained your position that you are insisting that the language of the most recently expired agreement be continued on all of those subjects." The only change in this last offer was to article 5 (grievance and court procedure), from the parties going to Federal District Court to each party resorting to "whatever judicial remedies" that might be available after exhausting the grievance procedure. (Id.)

12. The Union votes against Respondent's last, best, and final offer

By letter dated June 8, Sprague advised Respondent that his membership had rejected Respondent's last, best, and final offer dated June 4, and reminded Respondent that the Union had counteroffered to pay weekly healthcare insurance premium contributions of about $15 on a pretax basis. Sprague also noted that the Union had "TA'd" nine of Respondent's contract proposals on April 10, but that Respondent "[had] not TA'd one Union proposal." He pointed out that the revised grievance provision still required the parties to go to court rather than advance to arbitration. Finally, Sprague said that he and his team would be available to meet again on June 13 if Respondent was interested in a new contract. (GC Exh. 17.) At this point, communications between the parties establish that the parties differed in their opinions as to whether they had reached impasse.

Prior to the next meeting, Sprague attempted to meet privately with Ryan Hendrickson, with whom he had dealt in the past , since he felt he was not getting anywhere at the bargaining table. He explained that he ran into and talked to Ryan Hendrickson because Ryan worked with the employees on a daily basis. At first, Ryan agreed to meet, but then canceled.

13. Seventh bargaining session—June 13—the union presents its "Final Proposal"

Despite its alleged impasse declaration, Respondent met with the Union on June 13. Although the mediator was not available for this meeting, the parties met because Sprague was about to have surgery on about June 15. Sprague submitted what was entitled the Union's "Final Proposal." This proposal included three options. The first two options required a 1-year contract extension (of the expired contact), but with employees contributing $15 (on a pretax basis) per week towards healthcare premiums. The second option included the first option plus the healthcare opt-out alternative (with an attached copy of the parties' 2008 agreement for Fund participation opt outs). The second option also provided that the parties utilize the Industrial Board's arbitration and grievance process rather than going to court. The third option simply read, "Work Stoppage." (GC Exh. 18.)

The attached copy of the recommended grievance procedure stated that:

> Step 3 In the event that Step 2 does not settle the complaint, it shall be referred to the Western Michigan Industrial Board (WMIB), unless either party objects to the use of the WMIB. In the event of an objection by either party to the use of the WMIB, the grievance may be presented to the American Arbitration Association (AAA) upon the request of the Union or the Company. The President or the Executive Board of the Local Union shall have the right to determine whether or not the grievance is qualified to be submitted for arbitration by the Union.

(Id.) There, this proposal did not restrict or limit the parties to the Industrial Board, but allowed them to also pursue arbitration with the AAA upon request by either party.

Regarding the Fund requirements for opting out, Sprague admitted that it would require a new memorandum of understanding between Respondent and the Union; proof that the employees who applied had other (adequate) insurance; and the Fund's approval of each application. Respondent pointed out the materials supplied by the Union did not include the criteria by which the Fund approved applicants, and that Sprague had not provided the number of interested employees as promised. Initially, Sprague said that he did not recall making this promise. However, when he was shown his affidavit, he acknowledged that he said he would get a count of those interested, but decided not to since Durbrow had said that it would "be a waste of his time to see what the cost savings would be on opting out." As previously mentioned, Sprague had informally polled members at a recent union meeting, and learned that two unit members were interested in volunteering to opt out of the health plan coverage. It is undisputed that he communicated this to Respondent's negotiating team, and that Durbrow had immediately expressed his disinterest with the opt-out option. Thus, I credit Sprague's reasons as to why he did not poll the remainder of his membership. (Tr. 204–206, 208, 212–213.)

During this meeting, Sprague told Respondent's team "that there was no way that . . . their offer was going to be accepted," and that he needed some feedback on the Union's economic proposals since Respondent had not provided any guidance or anything in writing. He also warned Respondent that his mem-

[18] After this negotiating session, union membership voted to reject Respondent's May 30 last best offer and to strike if Respondent implemented its offer. (Tr. 284.) Sprague attempted to meet one-on-one with R. Hendrickson, with whom he had most dealings in the past, to try to make some headway on the negotiations, and to get Respondent to address some of its proposals. At first, R. Hendrickson agreed to meet with Sprague, but then declined saying that he could not meet with him without the rest of his negotiating team. (Tr. 110–111.)

bership might strike in order to push negotiations. Respondent's representatives caucused and returned to say that they were not going to change or discuss their proposals any further. Respondent's negotiating team met and returned to say that they were not interested in changing their minds or discussing anything further. (Tr. 120–123.)

Nevertheless, neither Sprague nor Mathews said that they viewed the Union's final proposal as its absolute last offer. Instead, they testified their proposal was in response to Respondent's last, best, and final offer, and that they still hoped and intended that the parties would continue to work towards an agreement. I credit Sprague's and Mathews' testimony that they did not intend to end negotiations with their final offer. Their testimony is supported by the fact that they voiced objection to Respondent's implementation letters and tried to resume bargaining.

D. Respondent's Implementation of Its Last, Best, and Final Offer and the Strike

1. Decision to strike

Later that evening or the next day, Sprague met with his membership to inform them that Respondent would not change its mind about implementing their last offer. At that time, they decided not to strike, but to wait to see if Respondent would actually implement its last, best, and final offer. Sprague claimed that he told his membership that if Respondent implemented its offer, he would contact the Federal mediator to see if the parties could resume negotiations. I credit this undisputed testimony regarding the discussions with the membership before the strike. They are further supported by the fact that the Union did not strike after the initial strike vote in April, nor did the Union strike immediately after the Respondent's first or second final offers on June 4 and 11. (Tr. 124–125.)

According to Sprague and Mathews, the Union learned that Respondent had implemented its offer on about June 23 when some of the bargaining members received their paychecks which reflected that Respondent had begun calculating their overtime pay after 40 hours a week versus 8 hours a day. Sprague, who was at home recuperating from surgery, left the decision to strike to Mathews and Bill Bernard, Jr. (Bernard), the Union's vice president, and the membership. The Union went on strike the following Monday, June 25. (Tr. 124–127, 232–233, 240, 242, 284–285.)

2. Poststrike bargaining meeting on July 26th

Bernard handled the strike/picket lines while Sprague was out on sick leave in June and July, but continued to consult with Sprague by telephone. According to Sprague, Bernard called him to say he had heard that Respondent had been telling employees that the Union was not willing to meet concerning when they would return to work. He then instructed Bernard to set up a meeting with the mediator present.[19]

On July 26, the parties met with the mediator, Brahaney. Sprague, Bernard, and Mathews attended the July 26 meeting on behalf of the Union, and the same representatives attended for Respondent. Neither of the parties presented any new proposals, and Respondent's representatives asked, "[W]hat are you willing to give us?" While the Union wanted to discuss pending issues, Respondent only wanted to know if the Union had any new proposals or concessions. Although it appears that the parties mostly caucused with Brahaney, they briefly discussed several pending issues. It is undisputed, and corroborated by Mathews, however, that Respondent was not really interested in further discussion or movement on these matters.

In Sprague's notes, he indicated with one star issues on which he felt there could be some movement (health care, fuel costs, term of contract) and with two stars issues about which the membership was more resistant (arbitration vs. court, elimination of the 401(k) match, voluntary layoff, and overtime after 40 hours). (GC Exh. 28.) He testified that he believed that the Union might have agreed to a reduction in the match if Respondent had provided the cost savings numbers he had requested. Thus, the meeting ended with Respondent maintaining its impasse stance and the Union wanting to further negotiate and move on the issues previously discussed and on those not yet addressed. (Tr. 131–132, 287–288, 292–294, 298.)

E. The Union Files a Grievance and Request for Information on July 31

Shortly after the strike began, Respondent changed the name on some of its trucks from Hendrickson Trucking to "AGG Trucking, LLC" (AGG). On July 31, Sprague, on behalf of the Union, sent Respondent a letter constituting a grievance, stating that the basis for it was:

> [T]hat it appeared to us that [AGG] . . . is nothing more than a disguised continuance of [Respondent], performing work historically covered by our labor agreement, and/or that [Respondent] has improperly and unlawfully transferred bargaining unit work to AGG without notice to Local 164 and without bargaining over the decision and its effects. In order that we may process this grievance and prepare for bargaining about any transfers of work and the effects . . . Local 164 needs information about both entities . . . to understand more fully the relationship between the two operations.

(GC Exh. 20.)[20] Included in this letter were the Union's 48 requests for information, as follows:

> 1. Who made the decision to open AGG? When was this decision made? Why was it decided to open it as a non-union operation in the middle of a strike?
> 2. Who owns the premises from which AGG is performing work? What is the relationship of AGG to Hendrickson Trucking?

[19] There was some confusion or disagreement as to who wanted or initiated this meeting, but both parties ultimately agreed to meet. Of note, Respondent states in its brief that the Union requested this meeting. (R. Br. pp. 18–19.)

[20] The Union filed unfair labor charges and amended charges on August 3, 16, and 30, alleging various violations, including, but not limited to, Respondent's failure to respond to these July 31 information requests, implementation of its last, best, and final offer without bargaining to impasse, and failure to provide requested cost savings information during the negotiation sessions. (GC Exhs. 1(a), (b), (e).)

3. How large is AGG eventually expected to be in terms of employment and productive capacity?

4. In what geographic area does AGG do business? In what geographic area does Hendrickson Trucking do Business?

5. Where is the office work for AGG performed?

6. Identify all managers or supervisors who have performed any work at or on behalf of AGG, the dates on which they have performed such work, the amounts of time which they have spent, and the types of work which they have done.

7. Identify the banking institution, branch location, and account number of all bank accounts for both AGG and Hendrickson Trucking.

8. Identify the person or company who performs the accounting function for AGG, and the names of the accountants. Provide the same information for Hendrickson Trucking.

9. Identify where and by whom the corporate and general business records for AGG are kept. Provide the same information for Hendrickson Trucking.

10. Identify where any by whom any other business records of AGG are kept. Provide the same information for Hendrickson Trucking.

11. Identify the principal bookkeeper for AGG. Provide the same information for Hendrickson Trucking

12. Identify the principal payroll preparer for AGG. Provide the same information for Hendrickson Trucking; and identify the bank account used to pay employees truck drivers.

13. Identify . . . health insurance program available at AGG, by carrier and policy number. Provide the same for Hendrickson Trucking.

14. Identify AGG's federal or state taxpayer identification number. Provide the same for Hendrickson Trucking.

15. Identify where and by whom the state or federal tax returns for AGG are kept. Provide the same for Hendrickson Trucking.

16. Identify any other state or federal taxpayer identification numbers for AGG. Provide the same for Hendrickson Trucking.

17. Identify where and by whom other federal or state reports for AGG are kept. Provide the same for Hendrickson Trucking.

18. Identify whether AGG and Hendrickson Trucking have the same worker's compensation insurance carrier, the same worker's compensation insurance policy, the same unemployment compensation insurance carrier, and any other common insurances or fringe benefits. Identify all such policies, carrier and fringe benefits.

19. Identify who supplied the money to purchase AGG or to begin its operations, along with the names or identification of persons who furnished the money to purchase the equipment, materials, supplies, etc. which are located at AGG.

20. Identify whether AGG is operating under a line of credit from Hendrickson Trucking, or has its debt or operations in any way guaranteed by or supported by Hendrickson Trucking.

21. Identify the dates, reasons for and amounts of any transfers of funds or work between AGG and Hendrickson Trucking.

22. Identify whether AGG rents, leases, or otherwise provides office space or any other services to Hendrickson Trucking.

23. Identify whether Hendrickson Trucking rents, leases or otherwise provides office space or any other services to AGG.

24. Identify all building or office suppliers for AGG. Provide the same for Hendrickson Trucking.

25. Identify any tools, materials, equipment including trucks or trailers, or supplies purchased by Hendrickson Trucking which are now used or have been used at or by AGG.

26. Identify any tools, materials, equipment (including trucks or trailers) or supplies purchased by AGG which are not used or have been used at or by Hendrickson Trucking.

27. Identify any lease arrangements or purchase agreements for any materials supplies or equipment (including trucks or trailers) between AGG and Hendrickson Trucking.

28. Identify whether any of the following services are provided to AGG by or at Hendrickson Trucking.

administrative
bookkeeping
clerical
detailing
estimating or costing
managerial
any other service

29. Identify the customer of AGG. Provide the same for Hendrickson Trucking.

30. Identify any customers which have been referred by Hendrickson Trucking to AGG, or vice-versa.

31. Identify any persons who have authority to negotiate, sell or bid jobs for Hendrickson Trucking.

32. Identify whether those same persons have authority to negotiate, sell or bid jobs for AGG.

33. Identify where AGG has advertised for employees/truck drivers, the persons who interviewed the employees/truck drivers of AGG, the persons who made the hiring decision, and any criteria which were used. Provide the same information for Hendrickson Trucking.

34. Identify by job title or craft position that employees employed by AGG and the skills which they possess.

35. Identify by job title or craft position and respective employment dates any employees of AGG who are or who have been employees of Hendrickson Trucking.

36. Identify any supervisors, superintendents, floor persons, or other supervisory persons of Hendrickson Trucking who have authority to, or have in fact exercised such authority, at AGG.

37. Identify any supervisors, superintendents, floor persons, or other supervisory persons of AGG who at any time worked for Hendrickson Trucking.

38. Identify any managerial personnel of Hendrickson Trucking who have authority to, or have in fact exercised such authority, at AGG.

39. Identify any managerial personnel of AGG who at any time worked for Hendrickson Trucking.

40. Identify any representatives or employees who are actively involved with day-to-day management or operations of Hendrickson Trucking who have authority to, or have in fact exercised such authority, at AGG.

41. Identify any representative or employee who are actively involved with day-to-day management or operations of AGG who at any time worked for Hendrickson Trucking

42. Describe the compensation program, including wage rates and fringe benefits at AGG. Who pays the employees/truck drivers at AGG, and from what bank account are their wage/compensation paid?

43. Describe the labor relations policy of AGG, and identify who established, controls or determines that policy.

44. Identify any labor relations representatives of AGG. Provide the same information for Hendrickson Trucking.

45. Identify the officers of ACC. Provide the same information for Hendrickson Trucking.

46. Identify the directors of AGG. Provide the same information for Hendrickson Trucking.

47. Identify the owners and stockholders of AGG, along with the amount of Hendrickson Trucking. Also include copies of any reports or forms filed with the State of Michigan related to ownership or status as a corporate LLC of any kind.

48. Identify places and dates of meetings of the board of directors or other governing body of AGG for the last 12 months. Provide the same information for Hendrickson Trucking.

(Excerpt from GC Exh. 20.) Sprague asked that Respondent furnish this information, in writing, within 10 days, and provide any subsequent information as it became available. In unrebutted testimony, Sprague said that the Union wanted to know how AGG came about, and if it meant that Respondent was about to go out of business or be replaced by AGG. (Tr. 137–141.) There is no evidence that Respondent furnished the Union with any of this requested information. It did provide some limited information about its relationship to AGG in response to a subsequent information request made by the December 27 (not at issue in this case).

F. The Union's Unconditional Request to Return Strikers to Work, Request to Bargain, and Other Correspondence Between the Parties in Late November and Early December

On November 30, Sprague, for the Union, sent Respondent three separate letters. The first was an unconditional request to return to work on December 3, which read in relevant part:

> Effectively immediately, Local 164 has ceased all picketing and strike activity. On behalf of all members of the bargaining unit, Local 164 unconditionally offers to return to work immediately. . . . Our members are prepared to return to work on Monday morning . . .Please contact the members directly to inform them of their appropriate report times. . . . If necessary, I am available to help you coordinate and facilitate that return to work process.

(GC Exh. 21.) The second identified ten bargaining unit members who planned to take the voluntary layoff.[21] (Tr. GC Exh. 22.) The third letter stated that the Union was "prepared to meet and bargain in good faith in an effort to achieve a collective bargaining agreement for [their] membership," and requested Respondent to provide available dates for bargaining. The Union further requested that,

> [i]n preparation for such bargaining . . . your Company rescind any and all unilaterally-implemented changes to employees' terms and conditions of employment (referenced in your June 8, 2012 letter, as well as in paragraphs 12 and 14 of the NLRB Complaint). This includes, but is not limited to, changes in wages and employees' medical insurance contributions. Local 164 also requests your Company to return to the status quo prior to making these changes and to make all employees whole for any financial losses suffered as a result of your unilateral implementation of those changes with interest, in accordance with the NLRB Complaint. . . .
>
> In further preparation for bargaining, Local 1614 again requests that your Company furnish the information which we have requested since on or about July 31, 2012 (see paragraphs 9 and 10 of the NLRB Complaint). Once we have received and analyzed that information, Local 164 may have further information requests.

(GC Exh. 23.)

On November 30, R. Hendrickson, designated as Respondent's president (also the mechanics supervisor), responded that "[t]here will be no work available for any returning strikers on Monday morning. We will be evaluating our work loads and manpower needs and will get back to you in the very near future." (GC Exh. 24.)

On December 10, T. J. Hendrickson advised Sprague, via letter, that its permanent replacement employees, hired during the strike, would be able to handle any available work during the winter slow down. He further stated that "[t]he employees who were striking have been placed on a preferential hire/recall list. When business picks up we will call them for available work by seniority. If you prefer a different order of recall, please let us know." (GC Exh. 25.)

On December 11, Sprague wrote to Respondent, stating that his November 30 letter was "clear that our members were prepared to return to work on Monday, December 3, 2012," and that the "Collective-Bargaining Agreement, Article II, should be followed when recalling employees and your referred to 'replacement employees' should be placed on the bottom of the seniority list for recall." Sprague further stated that "[t]o clarify, the first time I have ever heard that the Company hired replacement employees was in your letter of December 10,

[21] This voluntary layoff notification further stated that the ten employees should be recalled by lowest senior employee first. (Id.)

2012." Copies of the seniority list and the December 10 letter hand-delivered to R. Hendrickson were enclosed. (GC Exh. 26.)

Respondent's counsel, Timothy Ryan (Ryan), testified that in early December, he contacted Sprague, by telephone, to set up a bargaining meeting. He was not certain as to whether he called Sprague to discuss bargaining in this case, or whether it came up during a conversation about another case in which he and Sprague were involved. He said that he told Sprague that Respondent was willing to bargain, but would not be returning the strikers to work or returning to the status quo under the expired contract as requested by the Union in its November 30 letters. Ryan further testified that, Sprague responded, "Well, then just forget about it. We'll let the Labor Board figure it out." Ryan said that he interpreted this to mean that the Union did not want to bargain unless Respondent met those conditions. Sprague, on the other hand, did not recall this conversation taking place, and thought that Ryan may have talked to Bernard instead. I credit Sprague on this matter. Although he did not recall speaking to Ryan, Ryan, who made this assertion, did not recall the circumstances under which he spoke to Sprague. More troubling is Ryan's subsequent testimony that he tried to contact Sprague in January 2013 to try to get back to the bargaining table, and later pursued Sprague's replacement bargaining agent in March and April, for bargaining dates (see below). Ryan said that Respondent was now ready to bargain because it was the slow season. This is simply contrary to his reasons for not trying to resume bargaining in December 2012. Prior, undisputed testimony reveals that Respondent's slow season began in late November/early December. Although, I credit Sprague here, I will address in my analysis below whether this statement, had it been made, would have relieved Respondent of its obligation to resume bargaining. (Tr. 177–182; 385–386.)

G. Union's December 27 Grievance and Requests for Information

On December 27, Sprague sent a letter to Respondent asking that the letter be accepted as a grievance in accordance with the collective-bargaining agreement, and stating that,

> [t]he reason for our grievance is that it appeared to us that Hendrickson Trucking Inc. has hired permanent replacement drivers who are performing work historically covered by our labor agreement, and/or Hendrickson Trucking has improperly and unlawfully transferred bargaining unit work to those permanent replacement drivers without notice to Local 164 and without bargaining over the decision and its effects. In order that we may process this grievance and prepare for bargaining about any transfers of work and the effects of such transfers on the bargaining unit . . . [w]e need to understand more fully the relationship between the permanent replacement drivers and Hendrickson Trucking, Inc.

(R. Exh. 11.) This letter also included a detailed request for information regarding the permanent replacement drivers, including but not limited to, their status, names, and a number of requests regarding Respondent's business relationship with the replacements, as well as information about Respondent's financial records. Since this particular request for information was not included in the complaint or in the General Counsel's request for remedy in its brief, I will not set forth the specific requests.

By letter dated January 9, 2013, Timothy Ryan responded on Respondent's behalf, asserting that the Union's grievance lacked merit and would be denied. He explained that "[u]nder federal labor law, when the Union began its strike, Hendrickson was entitled to utilize replacement employees to continue its business, and to do so without any requirement that it engage in decision or effects bargaining." He also denied that Respondent had any contractual obligation to bargain since "neither the expired contract nor Hendrickson's last proposal included any requirement that Hendrickson engage in any decision or effects bargaining when hiring strike replacements."

Although he asserted his belief that the Union had no need for the information requested, Ryan stated that "in an effort to avoid any further controversy," he was providing information about the permanent replacement workers. He advised that T. J. Hendrickson made the decision to hire replacement drivers after the strike because drivers were needed, and that Respondent hired seven replacement drivers between July 18 and 31, 2012, and three more between September 4 and October 20, 2012. He also furnished the unit employee seniority list naming the 21 strikers, and named the supervisors who had performed various work during the strike. Ryan also noted that the Union had been aware of replacement drivers since the Union's representatives "repeatedly chased Hendrickson's vehicle[s]." (R. Exh. 12.) Ryan did not provide additional information as he did not believe that questions 7 through 45 were relevant. However, he did provide that

> [i]tems 7 through 45 of your request do not appear to have any relevance to any legitimate obligation you have concerning representation of the bargaining unit. If the purpose of those questions is to gain evidence to establish that Hendrickson Trucking and AGG Trucking are a single employer, you should know that Hendrickson Trucking does not dispute that they are. Whether replacement drivers operated a truck that stated AGG or a truck that stated Hendrickson, they were always employed by Hendrickson and they were always paid by Hendrickson, so it appears that there cannot be any legitimate issue about the relationship between those two entities.

(Id.) It is noted here that Respondent has claimed that this information about AGG was also sufficiently responsive to the Union's July 31 and November 30 requests.

By letter to Ryan on January 22, 2013, Sprague replied that Respondent had no right to hire permanent replacement employees since its unfair labor practices caused the strike, and that the former strikers should therefore be reinstated. Sprague explained that he needed the information requested to process the grievance filed on December 27 (claim that it hired replacements); to determine the nature of Respondent's payroll and other practices with respect to replacement employees; and to determine the nature and extent of any subcontracting work which occurred during the strike."[22] He also requested the following additional information: "copies of any applications filed by the replacement employees; copies of any letters or communications by and between Hendrickson Trucking and these employees; and copies of any documents which relate to or show the status of these employees." (R. Exh. 13.)

H. Union Replaces Sprague and Parties Meet One Last Time

On or about January 30, 2013, Sprague was relieved of his duties for the Union. According to Ryan, Respondent was now ready to meet with the Union in an attempt to "to resolve the outstanding contract and ULP issues." (R. Exh. 30, p. 1.) He finally learned from an NLRB representative that he should contact John Canzano(Canzano), an attorney and/or trustee for the Union. However, it was not until March 25 that Ryan began a series of email exchanges with Canzano in attempt to set up a meeting with the Union.[23] The parties finally met on April 10. (R. Exh. 30.)

During the April 10 meeting, Canzano and his assistant, Mike McElmury (McElmury), represented the Union, and T. J. Hendrickson, R. Hendrickson, and Durbrow represented Respondent. According to Ryan, Respondent, submitted proposals, but the Union did not. (Tr. 393.) However, Respondent did not submit any such proposals during the hearing, and Ryan and Canzano agreed in writing on that day that "these are rule 408 settlement discussions." After this meeting, Canzano and Ryan attempted to meet again, but were unable to do so before the hearing in this case. (Id.)

III. DISCUSSION AND ANALYSIS[24]

A. Respondent's Failure to Provide Information during Bargaining Precluded Impasse

The General Counsel alleges that Respondent failed to furnish the Union requested financial documentation to show how it reached its estimated cost savings totals for its newly proposed formula for employee contributions to health and welfare premiums, elimination of the 401(k) employer match, and revision of overtime calculations. The General Counsel claims that this information was (and is) necessary for the Union to formulate and evaluate bargaining proposals, and that since Respondent never provided this information to the Union, no good-faith impasse occurred during the bargaining process. Respondent argues that although it had no obligation to provide this information to the Union, it provided sufficient information to enable the Union to bargain. Respondent also asserts that it engaged in good-faith bargaining to impasse.

1. The information requested by the Union is necessary and relevant to the bargaining process

An employer is in violation of Section 8(a)(5) and (1) of the Act when it refuses to turn over to a union information that is relevant and necessary to the union in carrying out its collective-bargaining responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). When the information requested pertains to bargaining unit employees represented by a union, e.g., wages and benefits, it is presumptively relevant and necessary to the union's bargaining obligation. *Disneyland Park*, 350 NLRB 1256, 1257 (2007). However, when a union seeks information concerning matters outside the bargaining unit, such information is not presumptively relevant, and it is the union's burden to show relevancy. See, e.g., *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997), enfd. 157 F.2d 222 (3d Cir. 1998). This burden to show relevancy "is not exceptionally heavy." Rather, it is a "liberal discovery-type standard," and "the sought-after evidence need not be necessarily dispositive of the issue between the parties," but only have some bearing upon it, and be of "probable use to the labor organization in carrying out its statutory responsibilities." *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997), enfd. 172 F.3d 57 (9th Cir. 1999); *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006); *Shoppers Food Warehouse, Corp.*, 315 NLRB 258, 259 (1994).

While bargaining for a new contract in this case, the Union requested that Respondent furnish it with the calculations and financial information showing how it arrived at its cost saving totals for each of its proposals for the reduction in employer paid health and welfare premiums, elimination of the 401(k) employer match, and reduction in wages (overtime recalculated to begin after 40 hours rather than 8 hours). Since this information involves financial data, it is not presumptively relevant. It is, nevertheless, relevant as it regards the specific economic proposals regarding the bargaining unit employees' wages and benefits. See *National Extrusion & Mfg. Co.*, 357 NLRB 127, 128 (2011) (an employer's duty to bargain includes "a duty to provide information that would enable the bargaining representative to assess the validity of claims the employer has made in contract negotiations"); *Wilshire Plaza Hotel*, 353 NLRB 304, 305 (2008) (detailed calculations for the cost savings that respondent expected from its wage and benefit proposals were admittedly relevant to ongoing bargaining). Since it is relevant, Respondent had an obligation to provide it to the Union.

Respondent claims that it has no duty to provide any financial information to the Union because it has not asserted an

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[22] More specifically, Sprague renewed the Union's request for responses to items 1–6, 13–14, 18, 20–28, and 39–40 (of the December 27 request), to be provided in 10 days. He also said that Respondent could defer answers to the remaining questions pending receipt and review of these specific questions.

[23] It was evident from the email exchanges that Ryan was familiar with Canzano and that they had been working on another case together. (R. Exh. 30, p. 1.)

[24] In its answer, the Company alleged that the Board and all of its agents or delegates in these proceedings lack authority to proceed (in every stage) in this case because the Board lacks a quorum required by the NLRA. Consistent with Board precedent, I reject the Company's *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (petition for certiorari filed April 25, 2013), and *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3d Cir. 2013), defense. The Board has rejected similar contentions in numerous cases, see, e.g., *Bloomingdale's, Inc.*, 359 NLRB 1015 (2013). Further, I note that the Board now has a full complement of five members nominated by the President and confirmed by the Senate, and could, if they deemed appropriate, reaffirm the earlier Board's actions. Accordingly, I reject this affirmative defense.

inability to pay wages or benefits.[25] However, the Board has rejected the argument that an employer never has a duty to provide any financial information at all to the union where the employer has not asserted an inability to pay. While recognizing that an employer generally is not obligated to open its books/financial records to a union unless the employer has claimed an inability to pay, the Board has held that a union is entitled to financial records when the request is based on specific claims on which the employer has based its bargaining proposals. *Caldwell Mfg.*, supra at 1160; *National Extrusion*, supra, at 128. Thus, the employer violates Section 8(a)(5) and (1) when it fails to provide the requested information.

In *Caldwell*, *Mfg.*, supra, the employer maintained during negotiations that certain concessions were necessary to improve its competitive standing. In response to those specific assertions, the union requested information on which the employer relied, including material, labor and manufacturing costs, productivity calculations, and competitor data. The Board found that the union was entitled to that information, explaining that the employer, "in the course of bargaining, made the information relevant and created the obligation to provide the requested data." 346 NLRB at 1160. The Board further affirmed that a union is entitled in these instances to request information to evaluate and verify the respondent's assertions and develop its bargaining positions." Id. In *National Extrusion*, supra, the employer also cited rising production costs, falling production and loss/potential loss of customers as reasons for demanding significant wage decreases. The Board found that "the Union had a legitimate claim to information that it could use to understand, evaluate, and possibly rebut the Respondent's assertions." 357 NLRB 127, 130.

The Board also recognized that although *National Extrusion* did not involve an inability-to-pay claim, its holdings in that case and in *Caldwell Mfg.*, are consistent with the Supreme Court's observation in *Truitt* that, 'if . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.'" *National Extrusion*, supra, at 129, citing *Truitt*, 351 U.S. 149, 152–153 (1956).

Although I agree that this is not an inability-to-pay claim, I disagree that Respondent did not have an obligation to provide the Union with the requested cost savings information because it did not claim an inability to pay. As in *National Extrusion,* supra, and *Caldwell Mfg.*, supra. Respondent, during bargaining, created its own duty to respond to the Union's information requests through its claims it was not profitable and demands to save money through its various proposals. Thus, the Union here also had a legitimate claim for underlying financial data so that it could understand, evaluate, and possibly develop counterproposals.

Respondent's reliance on *Paperworkers Union*, 981 F.2d 861 at fn.1 (6th Cir. 1992), is misplaced here. In this case, the Sixth Circuit found that the Union was not entitled to financial information because the company had not asserted an inability to pay. (981 F.2d at 865–866 fn. 1) (obligation to provide financial information arises only if the employer claims an inability to pay). The Board has distinguished similar court opinions such as this as set forth above.[26]

Respondent asserts that since it allowed the Union access to its accounting "books" and spreadsheet, "detailing its profit and losses to support its need for cost savings," the Union's claim that it needed additional financial information is false. (R. Br. p. 33, fn. 6.) I disagree. For reasons set forth in the factual findings, I have credited Sprague's and Mathew's testimony that they were never provided with the spreadsheet on May 16 or at any other time during the bargaining process. Instead, Durbrow verbally told Sprague that Respondent needed to save about $75,000. Subsequently, after Sprague requested a breakdown and documentation, Durbrow said that it expected to save about $20,000 from the overtime calculation changes, about $24,000-$25,000 from elimination of the 401(k) employer match, and about $40,000 or the remainder from the employee healthcare cost contributions, without providing any data to support how Respondent arrived at these estimates. Further, as stated earlier, had the Union received this spreadsheet, it would have been an insufficient response as it did not include cost savings calculations or data for each of those economic proposals. During the hearing, Durbrow gave examples of the financial data on which he relied to determine the estimated cost savings, including: financial data for the prior 2 years regarding payroll records for overtime, 401(k) employer matching history maintained on spreadsheets showing how much was paid, and data showing history of health insurance premium costs. He also explained how all employees were affected by the cost savings proposals, and not just the bargaining unit. (Tr. 341–344.) There is no evidence, however, that Durbrow or any other of Respondent's representatives provided the Union with this explanation or supporting information during the negotiations for the new contract.

It is understandable that the Union did not trust the inexact, rather random and ambiguous cost saving totals thrown out at the bargaining table. In similar cases, the Board has made it clear that "[w]hile the sum of each year's savings would be of use to the Union, it left no way to see the basis of the Company's conclusion, no way to evaluate the accuracy of the claim, or what the impact of alternative proposals would be." See *National Extrusion & Mfg., Co.*, supra, at 159, citing *Wilshire Plaza Hotel*, 353 NLRB at 325 (it is an "unfair labor practice for respondent to respond to union's request for 'detailed' calculations of respondent's concessionary economic proposals by providing only 'flat amounts' to [the] union").

Further regarding the implication that the Union should have been able to calculate savings for the specific proposals from information it may have already had, "a union is entitled to have a calculation from the employer so that it can verify the validity of its own calculation. See *National Extrusion*, supra,

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[25] (R. Br. p. 36, fn. 6.) Respondent did, however, repeatedly assert its need to save money because it had not been profitable in the past, and did not expect to be so in 2011.

[26] The Board in *National Extrusion*, supra, distinguished *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d 570 (7th Cir.1986), denying enf. of *Harvstone Mfg. Corp.*, 272 NLRB 939 (1984), and *Nielsen Lithographing Co. v. NLRB,* 854 F.2d 1063, 1066 (7th Cir. 1988), denying enf. of *Nielsen Lithographing Co.*, 279 NLRB 877 (1986) (*Nielsen I*).

at 159, citing *Mary Thompson Hospital v. NLRB*, 943 F.2d 741, 747 (7th Cir. 1991) ("need for verification makes it immaterial that union can secure desired information" by other means). See also *Albertson's, Inc.,* 310 NLRB 1176, 1187 (1993) (employer's assertion that the union could ascertain the amount of trust fund contributions from plan documents did not excuse the employer's failure, and obligation, to give the union its own documentation of the actual contributions made where this data would allow the union to verify the plan information). Here, the Union may have initially received Respondent's tax returns and other financial information for several years through 2010, but the 2010 financial data showed Respondent had been profitable, as it also had been in 2008. This information appeared to be contrary to Respondent's mantra that it was not profitable and needed to save money with its economic proposals. In fact, there was no evidence that the Union should have been able to deduce, or make its own cost savings calculations from this information, much less determine whether or not Respondent was profitable in 2011 or during negotiations in 2012. Thus, this information is not a substitute for the cost savings documentation requested by the Union.

Additionally, I find that Respondent not only had an obligation to provide the Union with the requested cost saving calculations, but it also had an responsibility to provide the 2011 income tax returns once it received them.[27] Respondent argues it had no responsibility to open its books to the Union, but the fact remains that it already opened that door in order to show the status of its profitability, or lack thereof, and need to save money.

Finally, Respondent argues in its brief that the Union only asked for cost savings information once during negotiations. I reject this argument since the Union is not required to repeat its request. Nor, does the request have to be in writing. *Bundy Corp.,* 292 NLRB 671 (1989); *Harvstone Mfg. Corp.*, 272 NLRB939 (1984), enfd in part 785 F.2d 570 (7th Cir.), cert denied 479 U.S. 821 (1986). Respondent's outright failure to furnish the Union with the requested information is of particular concern given the division between the parties on the issues of health and welfare cost employee contributions, elimination of the 401(k) match, and revision of the overtime calculations. Here, Respondent neither requested clarification nor requested information on relevancy. Nor did it claim the request to be unduly burdensome or unavailable. Rather, Respondent simply failed to provide the information. It is well established that the Act does not permit an employer to simply refuse to respond to a request, even when thought to be ambiguous or overbroad, but requires the employer to either request clarification or comply with the extent the request asks for necessary and relevant information. See *Keaubou Beach Hotel,* 298 NLRB 702, 702 (1990).

All said, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act when it failed to respond to the Union's request for information when bargaining for the new contract.

2. Respondent's failure to provide requested cost savings information during the bargaining process precludes a valid impasse and unilateral implementation of its last, best, and final offer

The Board has consistently found that the failure to provide information that is important to ongoing bargaining will preclude a valid impasse. See *E. I. du Pont & Co.*, 346 NLRB 553, 558 (2006) (the Board affirmed that "[i]t is well settled that a party's failure to provide requested information that is necessary for the other party to create counterproposals and, as a result, engage in meaningful bargaining, will preclude a lawful impasse"), enfd. 489 F.3d 1310 (D.C. Cir. 2007) (recognized Board principle that "a finding of valid impasse is precluded where the employer has failed to supply requested information relevant to the core issues separating the parties." (quoting *Caldwell Mfg. Co.*, 346 NLRB at 1170). See also *Decker Coal Co.*, 301 NLRB 729, 740 (1991) ("[a] legally recognized impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations"). Consequently, an employer may not implement a final offer in the absence of a lawful, good-faith impasse. *Bottom Line Enterprises,* 302 NLRB 373, 374 fn. 9 (1991) (citing *NLRB v. Katz*, 369 U.S. 736 (1962); *White Oak Coal*, 295 NLRB 567, 568 (1989); and *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 206 (2011). Since I have found that Respondent's failure to furnish the Union with information to show how it determined its projected cost savings totals precluded a valid good-faith impasse and therefore bargained in bad faith, it follows that Respondent further violated Section 8(a)(5) and (1) when it implemented its last, best, and final offer.

B. Totality of the Circumstances

Assuming, arguendo, that Respondent's refusal to provide requested information alone did not prevent a lawful impasse, I also find, after considering the facts above under the totality of circumstances standard, that the parties did not reach a valid impasse. The Board defines impasse as the point in time during negotiations when the parties are warranted in assuming that further bargaining would be futile and where both parties believe that they are "at the end of their rope." *A.M.F. Bowling Co.*, 314 NLRB 969 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995). In *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968), the Board enumerated some of the factors it considers in determining if the parties have reached impasse, including the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors in deciding whether an impasse in bargaining existed. The Board has held that where a party declares an impasse, the burden of proof rests with the party claiming the impasse. *L.W.D. Inc.*, 342 NLRB 965 (2004); *CalMat Co.*, 331 NLRB 1084, 1097–1098 (2000), *CJC Holdings, Inc.*, 320 NLRB 1041 (1996).

I will primarily address the factors as outlined in *Taft Broadcasting Co.*, supra, to the extent that both parties mention or refer to them in their respective posthearing briefs.

[27] Durbrow testified that he received the 2011 income tax information. This was not provided to the Union.

1. Bargaining history

The record establishes that the parties had a history of not only successful collective bargaining, but of ratifying contracts before and after the prior agreement expired. The Union also had a history of making concessions, and it was not the first time that the Union stood its ground before finally agreeing to make concessions in order to save Respondent money. Likewise, it was undisputed that the Union historically used the strike vote and/or threat of strike as a strategy during the bargaining process with Respondent, without evidence of impasse or failure to ratify a new contract. This is by no means dispositive on the issue, but it appears that Respondent declared impasse without much regard to this past bargaining history.

2. Lack of good-faith bargaining

I find that Respondent's failure to provide the requested cost savings information to the Union, in violation of the Act, indicative of a lack of good faith during the bargaining process. "A failure to supply information relevant and necessary to bargain constitutes a failure to bargain in good faith in violation of Section 8(a)(5), and no genuine impasse could be reached in these circumstances." *Pertec Computer Corp.*, 284 NLRB 810 (1987). The Board in *Decker Coal Co.*, supra at 740, recognized that as in *Pertec*, most cases applying this principle are ones where the employer has unlawfully refused, altogether, to provide the information. Such is the case here.

The General Counsel alleges that this failure, along with Respondent's insistence on requiring the parties to go to Federal district court, rather than to arbitration, to settle **all** disputes reflects a lack of good-faith bargaining on Respondent's part. Respondent, on the other hand, argues that it acted in good faith throughout the entire process. There is certain conduct that has been deemed to be indicative of lack of good-faith bargaining, which includes: unreasonable bargaining demands, delay tactics, unilateral changes in mandatory subjects of bargaining, efforts to bypass the Union, withdrawal of previously agreed-upon provisions, failure to designates agents with sufficient authority to bargain, and arbitrary scheduling of meetings. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). A determination that a party has not bargained in good faith does not, however, require a finding that an employer has engaged in all of these activities. *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000).

Here, there is no evidence that Respondent employed delay tactics, implemented unilateral changes in mandatory subjects of bargaining before declaring an unlawful impasse, tried to bypass the Union, or failed to designate agents with authority to bargain. Indeed, as Respondent claims, it participated in the process, recommended the parties have a mediator, offered up several proposals, albeit one or two contained few if any significant changes. However, I agree with the General Counsel that Respondent made an unreasonable bargaining demand that the parties utilize Federal or other courts to settle their labor disputes.

Throughout bargaining, Respondent went back and forth on this provision. Respondent initially proposed, under article 5, "Grievances and Legal Challenges," that after the parties exhaust their grievance procedures, the matter will be referred to "TRIAL" upon the request of either party. The same provision also stated that after certain approvals by the Union, the "grievance may be submitted . . . [t]o TRIAL or procedure mutually agreeable [emphasis added] to by both the [e]mployer and the [u]nion," with the parties being bound if they go to trial with certain limitations also set forth therein. (GC Exh. 6.) In its April 25 and 27 proposals, Respondent removed the initial language and noted that it was waiting for more information regarding the Western Michigan Industrial Board, including procedures on attending a hearing. (GC Exh. 11.) However, on May 21, Respondent changed its proposal to reflect that if all disputed matters were not settled through steps 1 and 2 of the grievance procedure, or step 3 submission to the Federal Mediation and Reconciliation Service, then the matter would be filed as a complaint in the United States District Court, Eastern District of Michigan. (GC Exh. 13.) Finally, in its last, best, and final offer of June 4, Respondent changed step 4 of its grievance and court procedure article 5 to read that "[i]f no settlement has been made pursuant to Steps 1, 2, and 3, and the aforementioned grievance procedure fails, then either party may pursue its judicial remedies." There was no language to explain what "judicial remedies" meant, or examples of such remedies, but Respondent made it clear that it still intended for the parties to bypass the arbitration process and go to court. (GC Exh. 16.) On its face, this may appear to be a part of Respondent's bargaining strategy, but upon closer look, it seems Respondent went to great lengths to hold onto this provision.

Respondents offered several reasons for wanting to go to court versus arbitration, most of which defied logic. First, Respondent said that arbitration would be far more costly and less efficient than going to court. T. J. Hendrickson said that arbitration was more costly because they would have to "fly people in from all over the place," and that as in-house counsel it would be part of his job to go to court. He indicated that he had more court experience, but offered no reason he could not handle arbitration. He also admitted on further questioning that the cost for using the AGGregate Carriers Association in the past was fairly minimal (included in the membership fees). Second, T. J. Hendrickson, expressed his concern that he learned that the Industrial Board would not allow him, as an in-house counsel, to represent Respondent unless he was also an officer. Finally, T. J. Hendrickson explained that based on his past experience with the AGGregate Carriers Association, he believed that the Industrial Board's procedures would favor or be biased towards the Union. However, the parties had not utilized or required arbitration or use of such a board, association or panel for arbitration services in over 10 years, despite its provision for such a process in its prior collective-bargaining agreements. In addition, the Union countered in one of its proposals that in the event that either party would object to the use of the Industrial Board for resolving grievances, they could be presented to the America Arbitration Association (AAA). Respondent did not provide evidence that T. J. Hendrickson could not have represented Respondent before the AAA or before a similar arbitration forum.

Further, the proposal for a trial in court in lieu of arbitration is not only contrary to Respondent's goal to control costs, but it goes against generally accepted opinion that it is normally far less costly and expeditious to go to arbitration than to take a dispute into any type of court. The Board has recognized that arbitration usually costs less and is more efficient than litigation, and the Supreme Court and Congress have certainly found arbitration to be the preferred process for settling labor disputes. See *Collyer Insulated Wire*, 192 NLRB 837, 843 (1971); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 578 (1960). Since arbitration has been deemed an essential part of collective bargaining, Respondent's demand to remove it, along with its refusal to supply requested information, taints and frustrates the bargaining process. Thus, I reject Respondent's argument and reliance on *Phelps Dodge Specialty Copper Products Co.*, 337 NLRB 455, 457 (2002), that even if its proposals appear regressive or reasons for them unpersuasive, they are not "so illogical as to warrant an inference that" it intended to avoid reaching an agreement or frustrate the process.

Respondent's insistence that any and all disputes between the parties arising out of the contract (i.e., relating to all of employees' terms and conditions of employment) go from the internal grievance process straight to court is also troubling because it appears that Respondent was implicitly attempting to limit or bar the exercise of individual bargaining unit employees' (or their agents') statutory right to file charges with the Board as well as to pursue the full grievance and arbitration process. See *Athey Products Corp.*, 303 NLRB 92, 96 (1991); *Isla Verde Hotel Corp.*, 259 NLRB 496 (1981), enfd. 702 F.2d 268 (1st Cir. 1983); *Reichold Chemicals*, 288 NLRB 69 (1988). The Board has consistently held that an employer violates the Act when it requires employees to waive their right (explicitly or implicitly) to file charges with the Board. *Athey Products*, supra; *Retlaw Broadcasting Co.*, 310 NLRB 984 (1993). I am not finding a per se violation regarding this matter, but rather that Respondent's insistence and inclusion of such a provision supports a finding that Respondent did not engage in good-faith bargaining.

In support of its bargaining to a good-faith impasse argument, Respondent also points out that it made numerous concessions and/or engaged in progressive bargaining by agreeing to withdraw a number of its initial proposals; reaching tentative agreements; agreeing to only eliminate its 401(k) match until it became profitable; decreasing its initial proposed employees' contributions to health and welfare premiums; and changing the dispute resolution option from filing in Federal district court to the parties' choice of judicial remedies. However, I find that Respondent's refusal to provide information on the critical issues to which the Union was entitled plus its unreasonable demand that the parties bypass arbitration tainted the bargaining process and constituted a lack of good-faith bargaining.

3. Contemporaneous understanding of the parties

In order to establish the existence of impasse, Respondent must prove that there was a contemporaneous understanding by both sides that they had reached impasse. *Monmouth Care Center*, 354 NLRB 11, 57 (2009). It is clear that the Union did not believe that the parties were at impasse in May or June 2012, and that Sprague strongly voiced his objection and disagreement with Respondent's assessment and declaration that it had they had. Although the Union believed it had made enough concessions in prior years, and did not receive the requested information, it still countered Respondent's health and welfare proposals by offering to pay employee contributions of $15 per employee per week on a pretax basis and to reinstate the opt-out option. The Union also proposed maintaining the status quo except for the tentative agreements made on April 10 and the $15 employee contributions to health care, so that the parties could determine whether or not Respondent was actually profitable from 2011–2012.

Indeed, the Union's position throughout negotiations was that further negotiations might be fruitful, especially if Respondent would provide it with the requested cost savings information. In such circumstances, it is clear that an impasse cannot be found to have existed on July 1. See *Newcor Bay City*, 345 NLRB 1129, 1238–1239 (2005) (union's continued assertion that movement is possible in future, depending in part on what information respondent provided, substantial evidence of finding no impasse). Despite the fact that the Union had not offered concessions and counterproposals on overtime and the 401(k) match, it maintained its intention to be flexible and desire to continue bargaining. See *Grinnell Fire Systems Co.*, 328 NLRB 585, 585–586 (1999) (no impasse where employer expressed unwillingness to move from its position and union had not offered specific concession, but had declared its intention to be flexible and sought further bargaining). Given the record as a whole, I conclude that as of June 13, the parties had not exhausted prospects of reaching an agreement. The Union had certainly not reached the end of its negotiating rope. *PRC Recording Co.*, 280 NLRB 615, 635 (1986).

Overall, despite having conflicting goals, the parties were able to work out several tentative agreements at their April 10 session. Further, in this and later sessions, Respondent also withdrew several of its own initial proposals, including limiting employees to 1 week of vacation during the busy season, reducing vacation pay (back to $1 per hour from $.50 per hour), implementing a tool allowance of $200 (versus 0), increasing the eligibility time for health care coverage (back to 90 days from 180 days), and agreed to the Union's proposal to eliminate the super seniority provision placing the chief steward at the top of the seniority list. Respondent also agreed to eliminate the 401(k) employer match until it became profitable (versus indefinitely). The Union, on the other hand agreed to continue the freeze on wage rate increases, a huge concession after years with no raises. Respondent reduced its initial proposed employees' contributions to health and welfare premiums from 25 percent to 20 percent for drivers and 15 percent for mechanics/mechanic helpers, and then down to 15 percent for drivers and 13 percent for mechanics/mechanic helpers. At one point, it offered a second option with flat employee contributions which increased each year over the life of the agreement. The Union, in turn, agreed to have members pay $15 each per week towards the health and welfare insurance costs, and sought to allow the opt-out option. In addition, Respondent eliminated the super seniority provision for chief stewards as initially recommended by the Union, the only concession actually made by Respondent in response to the Union's initial proposals. Indeed, contrary to Respondent's contention, the Union had shown flexibility on several significant issues just as it had. This is true even though Respondent had also declined to compromise on several critical issues and been unwilling to provide financial documentation that might very well have helped further progress towards a new agreement. *Newcor*, supra. Respondent may have been frustrated with the Union's pace in agreeing to concessions, this did not mean that the Union was ready to abandon negotiations. Id.

I am not persuaded by Respondent's arguments that impasse is demonstrated by the fact that the Union held a ratification vote rejecting its offers and even presented a final proposal with three options, including a strike. The Board has held that a ratification vote rejecting such an offer does not in itself show that the parties are at impasse-instead, one must still consider whether further bargaining would be futile because both parties are at the end of their rope. *Ead Motors Eastern Air Devices*, 346 NLRB 1060, 1063 (2006) (considering the customary factors used to determine whether the parties are at impasse). Here, the evidence shows that after the Union's first vote rejecting Respondent's proposals and strike vote, the Union readily returned to the bargaining table, pursued counter proposals and continued to request more information about Respondent's proposals. Just because the Union was not willing to roll over and accept Respondent's offers does not mean that it believed further negotiations would not be fruitful. In light of these facts, Respondent did not carry its burden of showing that the parties were at a good-faith impasse when Respondent unilaterally implemented the terms of its last, best, and final offer. Additionally, Respondent did not implement its last, best offer on June 4, but instead sent the Union another last, best, and final offer to implement on June 11.

4. Number of bargaining sessions

The parties only had six bargaining sessions before Respondent declared they had reached impasse and implemented its last, best, and final offer, one of which was the first meeting with the Federal mediator which did not involve any negotiating or exchange of proposals. I do not find that intermittent correspondence and exchange of proposals without any discussion or meeting with the bargaining representatives constitute bargaining sessions. Although the parties need not participate in a set number of sessions, the Board has found six sessions insufficient to support an impasse. See *U.S. Testing Co.*, 324 NLRB 854, 860–861 (1997); see also *Taft Broadcasting Co.*, supra (finding no impasse after 23 sessions).

All of these factors taken together show that the parties had not reached a good-faith impasse, and therefore, unlawfully implemented its last, best and final offer on June 11.

C. The Strike was an Unfair Labor Practice Strike

The General Counsel alleges that the strike in which the bargaining unit engaged was an unfair labor practice strike because of unlawful impasse and implementation of Respondent's last, best, and final offer. Respondent argues that it was an economic strike because it did not engage in any unfair labor practices. If an employer's unfair labor practice was a contributing cause of a strike, the Board has determined that the strike is an unfair labor practice strike. *Executive Management Services*, 355 NLRB 185 (2010); *New Brunswick General Sheet Metal Works*, 326 NLRB 915, 915 (1998); *C-Line Express*, 292 NLRB 638 (1989). Likewise, the Board need not find that such a strike would not have occurred "but for" the unfair labor practice. *Decker Coal Co.*, 301 NLRB 729, 746 (1991). Rather, as long as it finds that the unfair labor practice has "anything to do with" causing the strike, the strike will be considered an unfair labor practice strike. *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145 fn. 5 (1995), quoting *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 419 U.S. 850 (1974); see also *General Drivers & Helpers Union Local 662 v. NLRB*, 302 F.2d 908, 911 (D.C. Cir.), cert. denied 371 U.S. 827 (1962). Thus, such unfair labor practice need not be the primary goal of the strikers. See, e.g., *Northern Wire v. NLRB,* 887 F.2d 1313, 1319–1321 (7th Cir. 1989) ("A strike caused in whole or in part by an employer's unfair labor practices is an **unfair labor practice strike.**"); *NLRB v. Moore Business Forms,* 574 F.2d 835, 840 (5th Cir. 1978) ("The employer's unfair labor practice need not be the sole or even the major cause or AGGravating factor of the strike; it need only be a contributing factor."). In the instant case, even though the union membership took a strike vote in late April, and Sprague threatened Respondent with a strike, there is no dispute that the Union did not go out on strike until it realized and had proof that Respondent had implemented its last, best offer. Indeed, after Respondent declared impasse and submitted a last, best offer to be implemented on June 4, and then a last, best, and final offer to be implemented on June 11, the Union did not initiate a strike. Since I have determined that Respondent's implementation of its last, best, and final offer constituted an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act, I find that the evidence sufficiently supports a finding that the unfair labor practice was a contributing factor to the Union's strike.

I reject Respondent's argument that the reasons for the initial strike vote should prevail in determining how to characterize the strike in this case. It is without merit, as is its reliance on case law regarding union membership's discussions at strike vote meetings. In *Mobil Homes Estates, Inc.*, 259 NLRB 1384, 1397, 1402 (1982), enfd. on other grounds 707 F.2d 264 (6th Cir. 1983), the Board affirmed that a strike was economic despite an employer's unlawful statements the day before the strike began since the union had previously held three strike votes. In a second case on which Respondent relies, *Facet Enterprises,* 290 NLRB 152, 154 (1988), enfd. on other grounds 907 F.2d 963 (10th Cir. 1990), the Board found that in requesting a strike vote, the only grounds offered or ever discussed by the union representatives dealt with the economic proposals. In another, *Christopher Construction Co.*, 288 NLRB 1272, 1276 (1988), the Board found that an economic strike was not converted into an unfair labor practices strike since there was no evidence that the strikers ever discussed or considered unlawful discharges as a reason to prolong the strike. In *Reichhold Chemicals*, 288 NLRB 69 (1988), revd. 906 F.2d 719 (D.C. Cir. 1990), on remand 301 NLRB 706 (1991), the Board concluded a strike was economic because the union employees went on strike following two strike votes, without mentioning the unlawful waiver of access to the Board by union members. Respondent relies on *Reichhold Chemicals* to argue that “information on which the employees acted when they voted to strike is what is crucial in determining if there is a causal connection” between the employer’s unlawful labor practice and their “determination to strike.” Id. at 73.

I find that these cases are distinguishable from the instant case. Here, the unlawful impasse and implementation occurred prior to the strike. I have credited the testimony that on June 13 or 14, union representatives (one of whom- Mathews- was also an employee as well as union officer) not only met with and discussed Respondent’s unwillingness to move forward with negotiations based on the impasse declaration and two notices of implementation, but also talked about and decided not to strike unless Respondent actually implemented its second last offer. Moreover, there is no dispute that the Union continued to negotiate and did not strike after the strike vote in April, nor did the Union strike immediately after Respondent’s first or second final offers on June 4 and 11. It is well established that a causal connection between the unlawful conduct and the strike may be inferred from the record as a whole. In re *Post Tension of Nevada, Inc.*, 352 NLRB 1153, 1163 (2008); *Child Development Council*, supra at 1145. Thus, it is quite reasonable, based on the evidence, to find a causal connection here between Respondent’s unlawful acts (impasse and implementation) and the strike.

Moreover, it matters not that the Union initially voted to strike in order to show that it was serious about its proposals, and to pressure Respondent into considering and accepting some of them since the evidence shows that the actual strike was primarily motivated, or least partly motivated, by Respondent’s unlawful impasse and implementation of its last, best, and final offer. This is not a case where the Union and/or its membership never considered unfair labor practices before striking. *General Drivers & Helpers Union Local 662 v. NLRB*, supra.

Additionally, Respondent cautions that since the Union might know that its articulated reasons for striking will determine its members’ recall rights, that I should “carefully distinguish facts demonstrating true motivation from efforts by the union at revisionist history.” (See R. Br. at 45, citing *C-Line Express*, 292 NLRB 638 (1989), and *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503 (4th Cir. 1998)). I reject this argument as well as I have considered, and there is no evidence that the Union skillfully contrived its reasons for initiating the strike, or served up “self-serving rhetoric of sophisticated union officials . . . inconsistent with the true factual context.” *C-Line*, supra at 638.

D. Respondent’s Failure to Reinstate the Strikers Following their Unconditional Request to Return to Work also Violated the Act

An employer violates Section 8(a)(3) and (1) of the Act when it fails or refuses to reinstate unfair labor practice strikers immediately after they have submitted their unconditional offer to return to work. In re *Post Tension of Nevada, Inc.*, supra, citing *Sproule Construction Co.*, 350 NLRB 774 fn. 2 (2007); *Mastro Plastics v. NLRB,* 350 U.S. 270, 278 (1956) (unfair labor practice strikers are entitled to immediate reinstatement to their former positions even if replacements have been hired). Respondent offered no other argument on this issue other than its assertion that the strike was an economic in nature, which I rejected. Therefore, I find that Respondent violated Section 8(a) (3) and (1) of the Act when it treated the unfair labor practice strikers like economic strikers, and failed to immediately reinstate them after the Union, on their behalf, served Respondent with its November 30 unconditional offer to return to work.

E. The July 31 and November 30 Information Requests

The standards set forth above regarding information requests are applicable here as well. As stated earlier, an employer’s duty to bargain includes a general duty to provide relevant and necessary information requested by the Union to carry out its statutory duties as its employees’ bargaining representative. *Crittenton Hospital*, 343 NLRB 717, 719 (2004), citing *NLRB v. Acme Industrial Co.*, 383 U.S. 432 (1967). The union need only show that it had a reasonable belief, based on objective facts, that the requested information here is relevant. *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007). Respondent has a duty to respond, and if it does not, it violates Section 8(a) (5) of the Act. See *Columbia University*, 298 NLRB 941, 945 (1990). Information sought pertaining to nonunit employees, including the employer and its managers and operations, are not presumptively relevant as is that requested about bargaining unit employees. The Board has held, however, that an exception to this rule is that “information regarding temporary [non-unit] workers performing bargaining unit work is presumptively relevant.” *Pavilion At Forrestal Nursing & Rehabilitation*, 346 NLRB 458, 466 (2006), citing *United Graphics*, 281 NLRB 463 (1986); *Phoenix Coca-Cola Bottling Co.*, 337 NLRB 1239, 1244–1245 (2002). Under either circumstance, the General Counsel met its burden of showing that the Union’s requests were relevant and necessary.

Respondent claims that it hired permanent, and not temporary workers, and that the Union knew this because it saw and allegedly followed the AGG trucks and replacement drivers. However, there is no evidence that the Union knew whether these replacements were temporary, permanent, or subcontractors. Respondent certainly did not furnish the Union with this information.

As set forth in the factual background, on July 31, the Union requested 48 pieces of information pertaining to AGG and its relationship to Respondent, as well as information about AGG’s employees and truckdrivers potentially performing the strikers’ work. Sprague explained that the union membership did not know if AGG was Respondent’s alter ego, if it would be replacing Respondent, or if Respondent was preparing to close its doors. The Union requested this information again on November 30. The Board has held that a union has no obligation to disclose the objective facts on which its belief that an alter ego existed was based at the time of the requests, nor is the union responsible for showing that these facts were either accurate or ultimately reliable. Instead, the General Counsel must only demonstrate that at the time of the requests, the Union had a reasonable belief based on the objective evidence that an alter ego relationship existed. *McCarthy Construction Co.*, 355 NLRB 50, 52 (2010); see also *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2344, 2357 (2012).

Here, it is undisputed that the union members observed that Respondent had painted the AGG name on its truck normally driven by bargaining unit employees. The Union also saw on the internet that AGG appeared to be one of Respondent's companies. These factual observations reasonably led to the Union's reasonable belief that AGG might be Respondent's alter ego, and also that others were performing the work of the strikers. Indeed, Respondent later admitted that it and AGG were in fact one and the same company, and that it allegedly formed AGG and painted the name on its truck to hide the trucks from union members who had been following the trucks. Therefore, information about AGG, its business operations and relationship to Respondent, as well as information about the workers driving the trucks, was relevant and necessary for the Union to carry out its representative function.

On November 30, the Union submitted its second request for this information in connection with its request to Respondent to meet to continue to bargain for a new collective-bargaining agreement. (GC Exh. 23.) Still, Respondent failed to respond. Instead, it argues that it was absolved of its responsibility to respond since on January 9, it advised Sprague, in connection with a separate information request (that of December 27), that if its purpose was to learn whether Hendrickson Trucking and AGG Trucking are a single employer, "you should know that Hendrickson Trucking does not dispute that they are." Respondent also advised that it always employed and paid the replacement employees. (R. Exh. 12.) The Board has consistently held that an unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) and (1) of the Act as a refusal to provide the information. *Monmouth Care Center,* 354 NLRB 11, 51 (2009), reaffirmed and incorporated by reference 356 NLRB 152 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012); *Overnight Transportation Co.*, 330 NLRB 1275 (2000). Here, the evidence shows that Respondent's January 9 response is not only an unreasonable delay in furnishing information, but an inadequate response to the July 31 and November 30 requests. Further, the time delay of over 6 months far exceeds the delays found acceptable by the Board. See *Postal Service*, 308 NLRB 547, 550 (1992) (delay of 5 weeks and 2 months excessive), *Postal Service,* 310 NLRB 530, 536 (1993) (1-month delay excessive); *El Paso Electric Co.*, 355 NLRB 428, 478 (2010) (a 3-month delay found to be in violation of Sec. 8(a) (5)). And, as the General Counsel points out, the delay in this case far exceeds the 1-month delay that the Board found reasonable in *Woodland Clinic*, 331 NLRB 735, 737 (2000).

Therefore, I find that Respondent's failure to respond to the Union's July 31 request for information violated Section 5(a) and (1) of the Act.

F. Respondent Violated the Act when it Refused to Resume Bargaining in 2012

On November 30, Sprague also notified Respondent that it was prepared to resume bargaining in order to achieve a collective-bargaining agreement, and asked for available dates for bargaining. (R. Exh. 23.) Sprague further requested that Respondent, in preparation for bargaining, rescind any and all unilaterally implemented changes, return to the status quo prior to making the changes, make all employees whole for any financial losses resulting from these changes, and respond to the July 31 information requests. Ryan, Respondent's outside counsel, testified that based on a telephone conversation he had with Sprague shortly thereafter, he did not pursue bargaining per the written request. As discussed earlier, Ryan claimed that when he told Sprague that Respondent would not rescind its implemented changes or return to the status quo, or make employees whole, or reinstate employees, that Sprague said to "forget it," he would just let the NLRB decide it. Sprague did not recall this conversation, and believed that Ryan may have talked to another union representative, Bernard. Ryan swore he spoke to Sprague, but did not recall when or under what circumstances–i.e., whether he called him directly about this case or whether he spoke to him after discussions about another case on which they represented the parties. I credited Sprague's account over Ryan's, but even if Ryan had this conversation with Bernard, it did not absolve Respondent of its responsibility to resume bargaining on a new contract when requested by the Union. I conclude that it was Respondent who refused to bargain when Ryan said it definitely not meet the requested prerequisites to bargaining. Respondent also argued that Sprague never requested bargaining dates in any of his subsequent letters to Respondent, but neither did Respondent until of course Respondent decided that it was ready to resume bargaining on a new agreement.

Indeed, Ryan, on behalf of Respondent, did not have any problem sending numerous emails to Canzano in March and April 2013 in an attempt to set dates for bargaining and FRE 408 discussions. Ryan explained this was because Respondent was ready to get back to the bargaining table during the slow season. However, witnesses testified that the slow season usually began in late November/early December, so this testimony is inconsistent with Ryan's failure to give Sprague bargaining dates in December 2012.

I find, therefore , that Respondent continued to fail to bargain with the Union between November 30 and his first attempt on March 25, 2013. (R. Exh. 30), in violation of the Act.[28]

CONCLUSIONS OF LAW

1. Respondent, Hendrickson Trucking Company, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union, Local 164, International Brotherhood of Teamsters (IBT), is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union is, and, at all material times, was the exclusive collective bargaining representative of the following appropriate units at Respondent's Jackson, Michigan facility.

> All drivers, mechanics, mechanic helpers and parts/utility employees employed by us at or out of its facility located at 1077 South Toro, Jackson, Michigan, but excluding all guards

[28] Of note, Respondent and the Union met to bargain on July 26, but Respondent refused to discuss any of the issues because the Union did not have anything new. Even if a union has nothing new, the Board has held that a respondent has an obligation to bargain. *Carey Salt Co.*, 358 NLRB 1142, 1167 (2012).

and supervisors as defined in the National Labor Relations Act (the Act).

4. By unilaterally implementing the terms of its last, best, and final collective-bargaining agreement offer without bargaining with the Union to a good-faith impasse, Respondent violated Section 8(a) (5) and (1) of the Act.

5. By failing and refusing to provide the Union with the information it requested on July 31, and again on November 30, which was relevant and necessary to the Union to carry out its collective-bargaining representative responsibilities, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing and refusing, on November 30, 2012, to immediately reinstate bargaining unit employees who had engaged in an unfair labor practice strike, beginning on June 25, 2012, and had made an unconditional offer to return to work, Respondent violated Section 8(a)(3) and (1) of the Act.

7. By failing and refusing to resume bargaining collectively towards a new collective-bargaining agreement on or after November 30, 2012, Respondent violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I shall order Respondent to rescind the unlawful unilateral changes contained in its last, best and final offer and unlawfully implemented/made on about July 11, 2012, regarding the unit employees' terms and conditions of employment, if the Union requests, and to restore the status quo ante, if the Union requests, that existed prior to the changes until such time as Respondent begins to bargain with the Union in good faith to a collective-bargaining agreement or good-faith impasse. This obligation also includes that Respondent immediately begin to bargain in good faith with the Union to a new collective-bargaining agreement or bona fide impasse.

I shall also order Respondents to make whole any unit employees affected by the unlawful unilateral changes. This includes reimbursing the employees for any loss of earnings or benefits resulting from the changes. Similarly, I shall also order Respondent to make whole the unfair labor practice strikers who were denied immediate reinstatement on November 30, 2012, for any loss of earnings and other benefits suffered as a result of Respondent's failure to reinstate them. Backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). It also includes making any benefit contributions on behalf of eligible unit employees that have not been made since the date of the unlawful changes, plus any additional amounts due the health and welfare and other funds in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979). It further includes reimbursing the unit employees for any expenses ensuing from Respondent's failure to make the required contributions to such benefit funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the same manner as backpay described above. Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate the affected employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award award(s) covering periods longer than one year. *Latino Express, Inc.*, 359 NLRB 518 (2012).

I shall also order Respondent, within 14 days of the below Order, to offer all of the unit employees who engaged in the unlawful labor practice strike on June 25, 2012, and who were not immediately reinstated upon unconditional request made on November 30, 2012, recall to their former positions, terminating, if necessary, any replacements who occupy those positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. This includes reimbursing said employees for any loss of earnings or benefits resulting from this failure to reinstate on or about November 30 in the manner as set forth above.

I shall also order Respondent to provide the information requested by the Union on July 31, and again on November 30.

Finally, I shall order Respondent to each post a notice to their employees regarding their respective violations in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

Accordingly, consistent with the foregoing, and based on the above findings of fact and conclusions of law and the entire record, I issue the following recommended[29]

ORDER

Respondent, Hendrickson Trucking Company, Jackson, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) If requested by the Union, implementing the unilateral changes contained in its last, best, and final offer and unlawfully implemented/made on about July 11, 2012, regarding the unit employees' terms and conditions of employment, without bargaining (and until it begins to bargain) in good faith with the Union to a new collective-bargaining agreement or bona fide impasse.

(b) Failing and refusing to immediately reinstate employees who engage in an unfair labor practice strike, upon their unconditional offer to return to work made on November 30, 2012.

(c) Failing and refusing to timely provide relevant and necessary information requested by the Union on July 31 and November 30, 2012.

(d) Failing to bargain in good faith with the Union towards a new collective-bargaining agreement or bona fide impasse. The Union is the exclusive collective-bargaining representative of the following appropriate bargaining unit at Respondent's Jackson, Michigan facility:

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[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

> All drivers, mechanics, mechanic helpers and parts/utility employees employed by us at or out of its facility located at 1077 South Toro, Jackson, Michigan, but excluding all guards and supervisors as defined in the National Labor Relations Act (the Act).

(e) In any like or related manner interfering with, retraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, if the Union requests, rescind the unlawful unilateral changes contained in its last, best, and final offer and unlawfully implemented/made on about July 11, 2012, regarding the unit employees' terms and conditions of employment, and to restore the status quo ante, if the Union requests, that existed prior to the changes until such time as Respondent begins to bargain with the Union in good faith to a collective-bargaining agreement or bona fide impasse.

(b) Make whole, with interest, all bargaining unit employees affected by the unlawful unilateral changes contained in its last, best, and final offer and unlawfully implemented/made on about July 11, 2012, regarding the unit employees' terms and conditions of employment, in the manner set forth in the remedy section of this decision.

(c) Within 14 days of this Order, offer all of the unit employees who engaged in the unlawful labor practice strike on June 25, 2012, and who were not immediately reinstated upon unconditional request made on November 30, 2012, recall to their former positions, terminating, if necessary, any replacements who occupy those positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make the unfair labor practice strikers whole for any loss of earnings and other benefits, with interest, suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(e) Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate the affected employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award award(s) covering periods longer than one year.

(f) Provide the Union with all of the information it requested on July 31 and again on November 30, 2012.

(g) Bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit employees.

(h) Within 14 days after service by Region 7, post at the Hendrickson Trucking Company facility in Jackson, Michigan, a copy of the attached notice marked "Appendix." [30] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 11, 2012.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 16, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally implement unilateral changes affecting the terms and condition of unit employees' employment (wages, hours and working conditions), without good-faith bargaining with the Local 164, International Brotherhood of Teamsters (IBT) (the Union) and reaching an overall good-faith impasse.

WE WILL NOT fail and refuse to immediately reinstate employees who engage in an unfair labor practice strike, upon their unconditional offer to return to work.

WE WILL NOT refuse to respond to and provide to the Union information that is relevant and necessary to its role as your bargaining representative in the following appropriate unit :

> All drivers, mechanics, mechanic helpers and parts/utility employees employed by us at or out of its facility located at 1077 South Toro, Jackson, Michigan, but excluding all guards and supervisors as defined in the National Labor Relations Act (the Act).

WE WILL NOT in any like or related manner interfere with, re-

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

strain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the status quo that which existed prior to any unilateral changes implemented without bargaining to a good-faith impasse until such time as we begin to bargain with the Union to a collective-bargaining agreement or good-faith impasse.

WE WILL, if requested by the Union, rescind any and all changes to your terms and conditions of employment made without bargaining with the Union to a good-faith impasse.

WE WILL pay bargaining unit employees for the wages and other benefits lost because of the changes to terms and conditions of employment that we made without bargaining with the Union to a good-faith impasse.

WE WILL bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of our unit employees.

WE WILL make offers of immediate and full reinstatement, pursuant to the Union's unconditional offer to return to work, to all employees who were on strike at any point since June 25, 2012, to the positions that they held prior to our unlawful discrimination against them, and offer recall rights in the event we failed or refused to properly reinstate employees, without prejudice to their seniority rights or other rights and privileges previously enjoyed, and to make them whole for any loss of wages and benefits they may have suffered as a result of the discrimination, with interest computed in accordance with National Labor Relations Board (the Board) policy.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

HENDRICKSON TRUCKING COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07–CA–086624 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.